TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. [redacted]64.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY COUNCIL OF ESTHERVILLE, SITTING AS A BOARD OF EQUALIZATION AND REVIEW, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED JANUARY 30, 1908.

(20,996.)

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of Iowa, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Iowa before you, being the highest court of law or equity in said state, in which a decision could be had on said suit between The First National Bank, of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsey Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson, and Robert Williams, Plaintiffs and Appellants, and The City Council of Estherville, sitting as a Board of Equalization and Review, composed of M. J. Groves, Mayor, A. O. Mead, W. Robb, A. C. Brown, J. T. Johnston, H. O. Silge, C. Henkins, members of the City Council of Estherville, Defendants and Appellees, wherein was claimed by the said plaintiffs and appellants certain rights, privileges and immunities, under the Statutes of the United States, and the decision was against the rights, privileges, and immunities specially set up and claimed under the Statutes of the United States as aforesaid, a manifest error hath happened to the great damage of the said plaintiffs and appellants, The First National Bank, of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsey Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson and Robert Williams Plaintiffs in Error herein, as by their complain- appears, we being

2 willing that error, if any hath been should be duly corrected, and full and speed- justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 1st day of February next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause, further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 2nd day of January A. D. 1908.

EDWARD R. MASON,
Clerk United States Circuit Court,
Southern District of Iowa.

Allowed.

[Seal U. S. Circuit Court, Southern District, Iowa.]

SCOTT M. LADD,
Chief Justice of the Supreme Court
of the State of Iowa.

Due and legal service of the above writ of error and copy thereof accepted this 14 day of January, 1908.

BYRON M. COON,
Attorneys for Defendants in Error.

3 [Endorsed:] No. —. In the Supreme Court of Iowa. First Nat'l Bank of Estherville *et al.*, Plaintiff, *vs.* City Council of Estherville *et al.*, Defendant. Writ of Error. Tax Copy Fee, $—. Chas. A. Clark, Cedar Rapids, Iowa, Attorney for Plaintiffs in Error. Filed Jan. 15, 1908. H. L. Bousquet, Clerk Supreme Court.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City Council of Estherville, Sitting as a Board of Equalization and Review, Composed of M. G. Groves, Mayor; A. O. Mead, W. Robb, A. C. Brown, J. T. Johnston, H. O. Sillge, C. Henkins, Members of the City Council of Estherville, Defendants in Error:

You are hereby cited and admonished to be and appear within thirty (30) days after this date at a term of the Supreme Court of the United States to be holden at Washington, on the second Monday of October, next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Iowa, wherein The First National Bank of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsen Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson, and Robert Williams, are Plaintiffs in Error, to show cause, if any there be, why the judgment rendered again said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Scott M. Ladd, Chief Justice of the Supreme Court of Iowa, this 2d day of January A. D. 1908.

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

Due and legal service of the above citation accepted and copy received this 14th day of January, A. D. 1908.

BYRON M. COON,
Attorneys for Defendants in Error.

5 [Endorsed:] No. —. In the Supreme Court of Iowa. First National Bank of Estherville, Plaintiff, *vs.* City Council of Estherville, Defendant. Citation. Tax Copy Fee, $—. Chas. A. Clark, Cedar Rapids, Iowa, Attorney for Plaintiffs in Error. Filed Jan. 15, 1908. H. L. Bousquet, Clerk Supreme Court.

6 In the Supreme Court of Iowa, January Term, A. D. 1907.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, EMMA G. ALLEN, F. EDWARD ALLEN, P. L. CHRISTENSEN, C. W. CRIM, JANET T. CLAY, ESTATE OF HENRY G. GRAAF, EMMA C. CLOUGH, ALSEY ANN LOUGH, G. H. MORSE, O. H. MCCARTY, A. D. ROOT, G. S. RINGLAND, A. A. RINGLAND, MARY E. SKINNER, E. I. SONDROL, LULU A. BROWN, M. G. WILSON, L. A. WATSON, and ROBERT WILLIAMS, Appellants,

vs.

THE CITY COUNCIL OF ESTHERVILLE, Sitting as a Board of Equalization and Review, Composed of M. J. GROVES, Mayor; A. O. MEAD, W. ROBB, A. C. BROWN, J. T. JOHNSTON, H. O. SILLGE, C. HENKINS, Members of the City Council of Estherville, Appellees.

Supersedeas Bond.

Know all men by these presents, that we, The First National Bank, of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsey Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson and Robert Williams, as principals, and M. K. Whelan & E. I. Sondrol, as surety, are held and firmly bound unto The City Council of Estherville, Sitting as a Board of Equalization and Review, composed of M. J. Groves, Mayor, A. O. Mead, W. Robb, A. C. Brown, J. T. Johnston, H. O. Sillge, C. Henkins, members of the City Council of Estherville, in the penal sum of Five Thousand
7 (5,000) Dollars, lawful money of the United States, for the payment of which sum well and truly to be made we bind ourselves, our heirs, executors, administrators, and successors, firmly by these presents.

Witness our signatures hereto this 23rd day of December, 1907.

Whereas, the above named, The First National Bank of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsey Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson, and Robert Williams, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above entitled cause by the Supreme Court of Iowa, in which said cause the said, The First National Bank of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsey Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson and Robert Williams, were impleaded as plaintiffs and appellants, and the said, The City

Council of Estherville, sitting as a Board of Equalization and Review, composed of M. J. Groves, Mayor, A. O. Mead, W. Robb, A. C. Brown, J. T. Johnston, H. O. Silge, C. Henkins, members of the City Council of Estherville, were impleaded as defendants and appellees.

Now therefore, the condition of this obligation is such that if the above named, The First National Bank of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsey Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mary E. Skinner, E. I.
8 Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson and Robert Williams, shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

THE FIRST NATIONAL BANK
OF ESTHERVILLE, IOWA,
E. B. SOPER,
C. J. IVES,
EMMA G. ALLEN,
F. EDWARD ALLEN,
P. L. CHRISTENSEN,
C. W. CRIM,
JANET T. CLAY,
ESTATE OF HENRY G. GRAAF,
EMMA C. LOUGH,
ALSEY ANN LOUGH,
G. H. MORSE,
O. H. McCARTY,
A. D. ROOT,
G. S. RINGLAND,
A. A. RINGLAND,
MARY E. SKINNER,
E. I. SONDROL,
LULU A. BROWN,
M. G. WILSON,
L. A. WATSON, AND
ROBERT WILLIAMS.
By SOPER, ALLEN & ALEXANDER, AND
C. W. CRIM, *Their Attorneys.*
E. I. SONDROL, *Surety.*
M. K. WHELAN, *Surety.*

Approved and accepted to operate as supersedeas this 2d day of January, A. D. 1908.

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

9 STATE OF IOWA,
Emmet County, ss:

We, M. K. Whelan and E. I. Sondral, being severally sworn, depose and say, that each for himself says: That he is a resident of the State of Iowa; that he is one of the sureties in the foregoing supersedeas bond for writ of error from the Supreme Court of Iowa to the Supreme Court of the United States, in the case of the First National Bank of Estherville, *et al. vs.* City Council, *et al.* That he is worth the sum of Ten Thousand Dollars ($10,000) beyond the amount of his debts, and that he has property liable to execution in the State of Iowa, equal to Five Thousand Dollars ($5000).

M. K. WHELAN.
E. I. SONDROL.

Sworn to before me and subscribed in my presence by M. K. Whelan and E. I. Sondral, this 23rd day of December, A. D. 1907.

[Seal District Court, Emmet County, Iowa.]

JNO. AMUNDSON,
Clerk of the District Court of the State of Iowa within and for Emmet County.

STATE OF IOWA,
Emmet County, ss:

I, John Amundson, Jr., clerk of the District Court of the State of Iowa within and for Emmet County, do hereby certify that I am well acquainted with M. K. Whelan and E. I. Sondral, sureties on the within and foregoing supersedeas bond, and with their property and circumstances. That they and each of them are men of large means and with little if any indebtedness, and that I would very quickly and readily approve the foregoing bond if the matter was pending in the court of which I am the clerk, and I do hereby certify that the sureties of said bond are entirely sufficient security for the amount of said bond.

In Witness Whereof, I have hereunto set my hand and fixed my seal of office at Estherville, this 23rd day of December, A. D. 1907.

[Seal District Court, Emmet County, Iowa.]

JOHN AMUNDSON,
Clerk Dist. Court.

10 [Endorsed:] In the Supreme Court of Iowa. First Nat'l Bank of Estherville *et al. vs.* City Council of Estherville *et al.* Supersedeas Bond. Chas. A. Clark, Cedar Rapids, Ia., for Plaintiffs in Error. Filed Jan. 2 1908. Jno. C. Crockett, Clerk Supreme Court.

11 In the Supreme Court of Iowa.

Filed July 3, 1907.

25414.

THE FIRST NATIONAL BANK OF ESTHERVILLE ET AL., Appellants,

v.

THE CITY COUNCIL OF ESTHERVILLE, ETC., Appellee.

Appeal from Emmet District Court—Hon. A. D. Bailie, Judge.

This is an appeal by the First National Bank of Estherville, and its several stockholders, from the action of the City Council of Estherville, sitting as a board of review and equalization of assessments made for the purposes of taxation. On trial of the appeal, a decree confirming the action of the Board was entered, and therefrom this appeal is prosecuted.

Soper, Allen & Alexander, and C. W. Crine, for Appellants.
Byron M. Coon, and Myerly & Davidson, for Appellees.

BISHOP, *J.*:

Following the docketing of the appeal from the board in the court below, the appellants appeared and filed a pleading containing a recital of facts and making demand for relief. Of the facts so recited the following were not disputed on the trial, and we set them forth as part of the history of the case. The appellant bank is a corporation organized under the National Banking Act of the United States having a paid up capital stock of $100,000, divided
12 into shares of $100 each. In January, 1906, an officer of the bank furnished to the city assessor a statement of the financial condition of the bank, together with a list of the stockholders. On its face, the statement so furnished disclosed that the resources of the bank,—including real estate valued at $12,500,—amounted to $479,911.46; and that this sum was balanced by the aggregate of the liabilities,—the latter including the capital stock, a surplus fund of $20,000; undivided profits, $1994.90, and an undistributed quarterly dividend amounting to $2,500. After excluding the value of the real estate owned by the bank, the assessor made assessments against the several stockholders on the basis of the par or face value of the stock. The work of the assessor coming on for review before the board, a raise in the assessment to $1.32 per share was ordered and entered. These facts having been set forth, two matters of contention were then presented by the pleading: 1. That the value of the stock as shown by the books of the bank did not exceed $112 per share, and hence the raise in assessment was exorbitant and unjust; 2. That the assessment as raised was unfair and inequitable in that the stock was not valued in proportion to other like personal property in the city of Estherville, but grossly in excess of the assessed

value of such other property. And the pleading contains an allegation that these were the matters of contention presented to the board. An answer was filed on behalf of the board, and therein it was denied that the assessment as raised was unjust; that, quite to the contrary, the actual and market value of the stock was even greater than that fixed in the raised assessment. And it was denied that the assessment was unfair as related to assessments on other like property.

On the trial appeal, it was conceded that the statement furnished by the bank to the assessor was correct in its figures according to the books of the bank. This concession having been made, the bank rested thereon that branch of its case having to do with the
13 value of its stock. It then introduced evidence showing that three other banks—one a state, one a savings, and one a private bank—were doing business in the city. By such evidence it was made to appear that these banks also furnished statements to the assessor, and that the assessment as made by him were predicated on such statements respectively. In the case of the savings bank, the statement showed capital stock $50,000, surplus $10,000; and from the aggregate of these deducted an item of $15,000, designated under the head of liabilities as "amount of notes." In the case of the state bank, the statement showed capital stock $50,000, surplus $10,000; and from the aggregate of these was deducted an item of $20,000, designated as "total amount of debt." In the case of the private bank the statement showed the bills receivable and money in bank on one side of the account, and the bills payable and deposits on the other side. And the value for assessment was arrived at by simply striking a balance. It will thus be seen that the stocks of the state and savings banks were assessed on a basis of valuation below par, while the private bank was assessed on the basis of book value. And it may be added in this connection that the record discloses that the assessments as made against the state and savings bank, respectively, were raised by the board to $120 per share. Over objection, the board was allowed to make proof that at or about the time in question several blocks of the stock of the appellant bank had changed hands on the basis of $175 per share, cash; that one of the officers of the bank had recently purchased ten shares at that price. And, further, that transfers of the savings bank stock had been made at $137 per share.

What is said foregoing comprehends sufficiently in detail the *fac* situation of the case, and, accordingly, we may not pass to a consideration of the questions presented by the appeal. In doing so we shall first dispose of a matter of contention brought forward
14 for the first time in argument in this court. This contention is through the action of the defendant board as complained of, there was worked a violation of section 5219 U. S. Revised Statutes, having to do with the subject of state taxation of national bank shares. As confessedly such matter was not presented to the board, or suggested on the trial in the court below, we cannot give consideration thereto on merits in this court. And this is to follow our repeated decisions bearing on the subject.

Railway Co. v. Cedar Rapids, 106 Iowa, 476;
***Trust Co. v. Fonda*, 114 Iowa, 728.**

Stated in simple form, the question first in order is thus: are assessors, board of review, and, on appeal, the courts, bound by the showing of the books of a national bank in arriving at the value of the stock of such bank for the purposes of assessment for taxation? Naturally enough, we turn first to the statutory provisions on the subject, for it is there that the measure of the power to assess and tax must be found. By Code, section 1305, it is provided that all property subject to taxation shall be valued at its actual value, and "actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade." And by section 1322—being part of the same chapter—it is provided that shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. To aid the assessor in fixing the value of such shares, the bank is required to furnish him with a verified statement of its financial condition, and "from such statement and other information he can obtain," he shall fix the value of such stock, taking into account the capital surplus and undivided earnings." The duty of the board of equalization is defined in Code, sections 1370-1. It "shall adjust assessments * * * by raising or lowering the assessment of any person * * * corporation * * * as to any or all the items of his assessment, in such manner as to secure the listing of property at its actual value." etc. And "the board shall * * * raise or lower the same as in their opinion will be just." In our view, these provisions of statute clearly contemplate that the board—as well as the assessor—shall have the right to seize upon any information within reach that may furnish aid to a conclusion: it may receive evidence or it may act on the knowledge of its own members.

Smith v. Board, 30 Iowa, 531.

And there is no requirement that the board shall make record of more than a bare expression of the conclusion reached by it in any given case. On appeal to the district court, the statute,—Code, section 1373—provides for a hearing as in equity. This, however, is not to be construed as clothing the court with jurisdiction to sit as an assessing tribunal.

Frost v. Board, 114 Iowa, 103;
Farmers, etc. Co. v. Fonda, 114 Iowa, 728.

As related to the amount of an assessment appealed from, the court has authority only to deal with the correctness of the conclusion reached by the board: it may reduce, or even cancel and set aside, but it cannot raise the assessment.

Farmers, etc. Co. v. Fonda, supra;
Bank v. Burlington, 54 Iowa, 609.

And, of necessity, the court can reach a conclusion only by giving consideration to the record, and to the competent and relevant evidence originally brought before it bearing on the subject.

Grimes v. Burlington, 74 Iowa, 123.

The court will presume in the first instance, however, that the board acted properly and upon sufficient evidence as to values, and

the burden is on the appealing taxpayer to overcome this pre-
16 sumption, and to establish the injustice or inequity of the raised assessment.

King v. Parker, 73 Iowa, 757;
Frost v. Board, Supra.

The appeal being in equity, and, therefore, triable *de novo* in this court, our inquiry takes this form: Have the appealing parties sustained the burden assumed by them of showing that the raise in assessment was unjust for that the actual or market value of the stock was less than the sum fixed upon by the board? As we have seen, appellants rely solely for an affirmative answer to this question upon the condition of the bank as disclosed by the statement furnished the assessor. And it is the argument of counsel that Code, section 1322 was never intended to authorize a valuation of stock otherwise than on the basis of the value of the tangible property of the bank; that as the statement to the assessor was admittedly correct in its figures, a raise in the assessment could only be accomplished by the inclusion of good will, and other intangible ingredients, as elements of value. And for this, counsel says there is no warrant of authority. Within certain limits this argument would have force if we were dealing with an assessment made against the bank itself, based—as of necessity it would have to be—on the tangible assets owned by it. Thus, no one would conceive that the actual value of a written promise to pay, held by a bank, or of a package of currency lying in its vaults, could be affected by matters such as the location of the bank, the character of its officiary, its good will, etc. But we are not dealing with the bank as such, nor—except as matter of evidence—with its assets, tangible or intangible. We have to do solely with an assessment against stockholders, and on tangible property,—the stock of which they are the individual owners. The capital stock in a corporation is a species of tangible property, in and of itself, is not to be doubted. And it is property separate and distinct from the property holdings, as such, of the corporation. Upon this, all the authorities are agreed.

17 *Bank v. Tennessee*, 161 U. S., 146;
Owensboro v. Owensboro, 173 U. S., 664.

Now, the term "property" includes everything of value, tangible or intangible, capable of being the subject of individual right or ownership. And market value "in ordinary course of trade," can have reference to nothing but the selling value; that is, the sum which in all probability can be realized therefrom if exposed for sale on the open market. Of course, in the case of commodities regularly on the market,—as stocks, bonds, grain, cattle, etc., respecting which values are established either by concerted action on the part of dealers, or as a result of the operation of the laws of trade, published quotations may be and are accepted as evidence of value without further inquiry. And this is so because—as it is well known,—men generally buy and sell having reference thereto: an intending buyer cannot hope to purchase for less than the quoted price, and an in-

tending seller cannot in reason expect to obtain more. Where, however, a commodity is not regularly on the market, proof of value, where in issue, must comes from original sources. Now, in business life, men buy property with intent to use beneficially, or with the expectation of selling, in turn, to another buyer at a profit. It follows that in the very nature of things the extent of the expected benefit, or the chance of profit, enters into the calculation, and influences, if it does not control, the market price. And in this view, it is not possible that there should be any fixed or arbitrary standard for the ascertainment of values. So it is, that in respect of any particular item, or class of items, of property, all those things which from any cause inhere in or attach to the same, and which contribute in any degree to its desirability, are always taken into account in arriving at a conclusion; indeed, it is not conceivable that the question of value could be determined adequately in any other way. And from this, it follows that in estimating the value
18 of stock in a bank or other corporation every fact condition having effect to influence or control must be considered. And this is true, because both intending sellers and buyers naturally take all such matters into consideration in determining upon a sale or purchase. This may be sufficiently illustrated by considering what would be the probable result of a change in the management of the plaintiff bank, and persons obnoxious to the general public were placed in charge. Can anyone doubt that a reduction in stock values would be the result? Or suppose that the bank for any reason should conclude to discontinue as a going concern, and take steps looking to liquidation. Could any one be in doubt as to the effect upon stock values? Our view as above expressed finds direct support in what was said by Mr. Justice White, speaking for the court, in *Bank v. Dodge*, 197 U. S., 70: "Under the law, shares in national banks must be valued at their full cash value, which the statute defines to be the amount at which they would be taken in payment of a just debt from a solvent debtor. These words are but synonymous with the requirement that, in assessing shares of stock their market value must be the criterion." Also in discussing the term "market value" Justice White uses the following language: "What, then, was embraced in the assessment of the shares of stock at their full cash or selling or market values? It embraced not only the book value of all the assets of the corporation, but the good will, the dividends earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanency of tenure of the officers, and all those other indirect and intangible increments of value which enter into the estimate of the worth of the stock, and help to fix the market value or selling price of the shares." And, giving construction to a statute similar to ours, the Supreme Court of Oregon in *Ankney v. Blakely*, 74 Pa. 485 says:

"Having now ascertained the meaning and purpose of Con-
19 gress in the adoption of section 5219, *supra*, we will determine what standard of value should be adopted for the assessment of shares in bank stock, it being insisted that the measure of such value is the face or par value of the paid up capital stock, increased

by the undivided earnings or profits of the bank; that, while other species of personal property may fluctuate, and its value be best determined by what it will bring in the market, the value of shares of bank stock remains constant and invariable, so long, at least, as the capital remains intact and unimpaired and is capable of exact ascertainment; and, that therefore, in view of the statutory directions that such shares shall be taxed at their par value, it was intended that the book value should be the test, and not the true cash value, as it is elsewhere directed what personal property shall be valued at for the purpose of taxation. B. & C. Comp. Sec. 3058. In this we are unable to agree with counsel. The section just noted prescribes that all personal property not exempt from taxation shall be valued at its true value in cash. Shares of bank stock are personal property, and there is nothing in the language employed by section 3042, *supra*, to betoken or signify any intention on the part of the legislature to set a different standard of value for that particular species of personal property, or that it should constitute any exception to the general provision, and, not being money which determines its own value, it must likewise be measured as other personal property, at its true cash value."

Without further discussion, it is our conclusion that it was not the intention of the legislature to provide for the assessment of bank stocks arbitrarily at their book value. Such is neither within the words of the statute or its meaning. And as in making an assessment any information apart from the books of the bank might be seized upon and made use of, so it was competent for the
20 board and the courts to the likewise in determining upon the equity and fairness of such assessment. Now, as we have seen, there was proof that stock of the plaintiff bank was being transferred at $175 per share, and it does not appear that this was for purposes other than investment. And as against this there was only the showing of the book value. In this situation,—and especially as the burden was on plaintiff,—we think it cannot be said that the raise in the assessment as made by the board was unwarranted or contrary to equity.

Coming to the second ground of complaint, we may dispose of the same by saying that the record does not disclose any such discrimination as to warrant interference.

On the whole we conclude that the decree should be, and it is affirmed.

21 STATE OF IOWA, *ss*:

Supreme Court of Iowa.

Be it remembered, That on the 6th day of March, 1907, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

Appeal from Emmet District Court.

Record Book 27, Page 298.

25414.

FIRST NATIONAL BANK OF ESTHERVILLE ET AL., Appellants,
vs.
CITY COUNCIL OF ESTHERVILLE ET AL.

Motion to advance this cause, having been considered, is sustained and it is ordered that cause be assigned at the foot of the Calendar for April period present term.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I, H. L. Bousquet, Clerk of the Supreme Court, have hereunto subscribed my name and affixed the seal of said Court, at Des Moines, this 20 day of Jany. A. D. 1908.

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET, *Clerk.*
By ——— ———, *Deputy.*

22 STATE OF IOWA, *ss:*

Supreme Court of Iowa.

Be it remembered, That on the 6th day of April, 1907, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

Appeal from Emmet District Court.

Record Book 27, Page 343.

25414.

FIRST NATIONAL BANK, Appellant,
v.
CITY COUNCIL OF ESTHERVILLE.

Case submitted on the Abstracts and Argument, on file and oral Arguments of Counsel.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I, H. L. Bousquet, Clerk of the Supreme Court, have hereunto subscribed my name and affixed the seal of said Court, at Des Moines, this 20 day of Jany. A. D. 1908.

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET, *Clerk,*
By ——— ———, *Deputy.*

23 STATE OF IOWA, *ss:*

Supreme Court of Iowa.

Be it remembered, That on the 14th day of Nov. 1907, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

Appeal from Emmet District Court.

Record Book 27, Page 597.

25414.

FIRST NATIONAL BANK ET AL., Appellants,
vs.
CITY COUNCIL OF ESTHERVILLE ET AL.

Submitted on Petition for Rehearing. Reply on file and oral Arguments of Counsel.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I, H. L. Bousquet, Clerk of the Supreme Court, have hereunto subscribed my name and affixed the seal of said Court, at Des Moines, this 20 day of Jany. A. D. 1908.

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET, *Clerk,*
By —— ——, *Deputy.*

24 STATE OF IOWA, *ss:*

Supreme Court of Iowa.

Be it remembered, That on the 19th day of November, 1907, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

Appeal from Emmet District Court.

Record Book 27, Page 610.

25414.

FIRST NAT'L BANK ET AL., Appellants,
vs.
CITY COUNCIL OF ESTHERVILLE ET AL.

This day Appellants' petition for rehearing having been fully considered by the Court is Overruled.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I, H. L. Bousquet, Clerk of the Supreme Court, have hereunto subscribed my name and affixed the seal of said Court, at Des Moines, this 20 day of Jany, A. D. 1908.

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET, *Clerk*,
By ——— ———, *Deputy*.

25 STATE OF IOWA, *ss*:

Supreme Court of Iowa.

Be it remembered, That on the 3rd day of July, 1907, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

Appeal from Emmet District Court.

Opinion Book 3, Page 193.

25414.

THE FIRST NATIONAL BANK OF ESTHERVILLE ET AL., App'Tnts,
vs.
CITY COUNCIL OF ESTHERVILLE, ETC.

In this cause, the Court being fully advised in the premises, file their written opinion Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby Affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the Court that the Appellants pay the costs of this appeal, taxed at $31.25, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I, H. L. Bousquet, Clerk of the Supreme Court, have hereunto subscribed my name and affixed the seal of said Court, at Des Moines, this 20 day of Jany, A. D. 1908.

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET, *Clerk*,
By ——— ———, *Deputy*.

26 STATE OF IOWA, *ss:*

I, H. L. Bousquet, Clerk of the Supreme Court of Iowa, do hereby certify that the foregoing is a full, true and correct transcript of the record, opinion and final judgment in a certain cause tried and determined in the Supreme Court of Iowa between The First National Bank of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, F. Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Estate of Henry G. Graaf, Emma C. Lough, Alsey Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson and Robert Williams, Plaintiffs and Appellants, and The City Council of Estherville, sitting as a Board of Equalization and Review, composed of M. J. Groves, Mayor, A. O. Mead, W. Robb, A. C. Brown, J. T. Johnston, H. O. Sillge, C. Henkins, members of the City Council of Estherville, Defendants and Appellees, as full true and complete as the same are of record and on file in my office.

I further certify that the writ of error, citation and supersedeas bond with the order of approval to operate as a supersedeas endorsed thereon are hereto attached in the original form, and that true and correct copies thereof have been retained in my office and this return is made in obedience to said writ of error.

In testimony whereof, witness my signature and the seal of said court at Des Moines, Iowa, this 15 day of January, A. D. 1908.

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET,
Clerk of the Supreme Court of Iowa.

[Endorsed:] Filed Jan. 15, 1908. H. L. Bousquet, Clerk Supreme Court.

27 In the Supreme Court of Iowa, January Term, A. D. 1907.
In Equity.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, EMMA G. ALLEN, F. EDWARD ALLEN, P. L. CHRISTENSEN, C. W. CRIM, JANET T. CLAY, ESTATE OF HENRY G. GRAAF, EMMA C. LOUGH, ALSEY ANN LOUGH, G. H. MORSE, O. H. MCCARTY, A. D. ROOT, G. S. RINGLAND, A. A. RINGLAND, MARY E. SKINNER, E. I. SONDROL, LULU A. BROWN, M. G. WILSON, L. A. WATKINS and ROBERT WILLIAMS, Appellants,

vs.

THE CITY COUNCIL OF ESTHERVILLE, Sitting as a Board of Equalization and Review, Composed of M. J. GROVES, Mayor; A. O. MEAD, W. ROBB, A. C. BROWN, J. T. JOHNSTON, H. O. SILLGE, C. HENKINS, Members of the City Council of Estherville, Appellees.

Appeal from the Judgment of the Emmet District Court.

Hon. A. D. Bailie, Presiding Judge.

Soper, Allen & Alexander and C. W. Crim, Attorneys for Appellants.

Byron M. Coon and Myerly & Davidson, Attorneys for Appellees.

Appellants' Abstract of the Record.

Due and legal service of the within abstract is hereby accepted this — day of December, 1906.

——— ———,
Attorneys for Appellees.

28 On the 3rd day of May, A. D., 1906, the appellants herein caused to be served upon appellees, the following

Notice of Appeal,

from the action of appellees, sitting as a board of review and equalization, as follows:

To the City Council of the City of Estherville, Iowa, sitting as a Board of Equalization and Review: You are hereby notified that the First National Bank of Estherville, Iowa, E. B. Soper, C. J. Ives, Emma G. Allen, Edward Allen, P. L. Christensen, C. W. Crim, Janet T. Clay, Mrs. J. P. Forrest, Henry G. Graaf Estate, Emma C. Lough, Alley Ann Lough, G. H. Morse, O. H. McCarty, A. D. Root, G. S. Ringland, A. A. Ringland, Mrs. Mary E. Skinner, E. I. Sondrol, Lulu A. Brown, M. G. Wilson, L. A. Watson and Robert Williams, stockholders in said Bank who are effected by the action of the City Council of the City of Estherville, sitting as a Board of Review and Equalization, in reviewing the assessment of the shares of stock of the appellant corporation, have appealed from the action of said

Board, had and taken at its regular meeting in April, A. D., 1906, to-wit, April 26th, 1906, in raising the assessed value of the shares of stock in said First National Bank from the book value thereof, shown by the statement of the condition of said Bank January 1st, 1906, to-wit: $122 per share, to an assessed valuation at $144 per share, to the District Court of the State of Iowa, within and for Emmet County; and you are further notified that said appeal will come on for hearing and trial before said Court at the August Term thereof, A. D., 1906, to be begun and holden at Estherville in said county on the 27th day of August, A. D., 1906; and that unless you appear thereto and defend on or before noon of the second day of said term of said court, default will be entered against you and judgment rendered thereon.

29 You are further directed and required to cause the City Clerk, as Clerk of the Board of Review, to make and deliver to the Clerk of the District Court of Emmet County, Iowa, ten days before the first day of said term of said court, to which this said appeal is taken, a transcript of the proceedings of said Board of Review in relation to fixing the assessed value of said stock of the First National Bank of Estherville, Iowa; and that upon failure to file such transcript, appellants will ask the court for a rule or order against you in relation thereto.

SOPER, ALLEN & ALEXANDER AND
C. W. CRIM,
Attorneys for Appellants.

Which said notice of appeal was duly filed in the District Court of the State of Iowa, within and for Emmet County on the 14th day of May, A. D., 1906, and the appeal duly docketed.

That thereafter on the 16th day of July, A. D., 1906, the appellants filed in the above entitled cause in the office of the Clerk of the District Court of the State of Iowa within and for Emmet County, their

Petition in Equity,

in this cause which is an appeal from the ruling of the Board of Equalization, setting up the following statement of their grounds for appeal:

First: That the First National Bank of Estherville is a corporation, duly organized and existing under and by virtue of the statutes of the United States, commonly known as the National Banking Act, the original act having been approved February 25th, 1863 and amendments thereto, and subsequent enactments additional thereto; and is engaged in the business of banking at Estherville, Iowa,

30 under the corporate name aforesaid; having a paid up capital stock of $100,000.00, divided into 1,000 shares of $100.00 each, a portion of which is owned by E. B. Soper, C. J. Ives, Emma G. Allen and other co-plaintiffs and appellants herein, and the amount of the assessed valuation of the personal property of the plaintiffs and appellants herein, is affected by the valuation placed

upon the shares of stock of the First National Bank of Estherville, by the appellees, sitting as a Board of Review.

Second. That on or about the — day of January, 1906, the City Assessor of the City of Estherville, in order to fix the value of shares of stock in the said First National Bank of Estherville, for the purpose of taxation for the year, 1906, applied to the cashier of said First National Bank of Estherville for a statement of its assets and liabilities, together with the names of its shareholders, and the number of shares owned and held by each; and in compliance therewith, the cashier furnished him a list of all stockholders of the bank, with the number of shares owned by each, with statement of the condition of the bank on the 1st day of January, 1906; which statement showed the assets and liabilities of said bank to be as follows:

Resources of First National Bank of Estherville on January 1st, 1906.

Cash due from banks	$ 13,754.30
Bills receivable owned by the bank	396,198.05
U. S. Bonds to secure circulation	25,000.00
Redemption fund with U. S. Treasurer	1,250.00
Bank building owned by bank in which its business is conducted	12,500.00
Overdrafts to sundry customers	6,737.28
Cash on hand in bank	24,471.83
Total resources	479,911.46

31 *Liabilities of First National Bank of Estherville on January 1st, 1906.*

Capital stock actually paid in	100,000.00
Surplus fund	20,000.00
Undivided profits	1,994.90
Dividends for last quarter 1905, being 2 1-2 per cent capital stock	2,500.00
Circulation outstanding	25,000.00
Deposits in bank, subject to check and time certificates	305,416.56
Bills payable, for borrowed money	25,000.00
Total liabilities	479,911.46

That the foregoing statement, then and there made to the assessor of the city of Estherville, is a true statement of the condition of said bank on said date, and shows fully all the resources, property and assets of the said First National Bank of Estherville, on January 1st, 1906.

That thereupon the assessor of the City of Estherville, proceeded to fix the taxable value of each of the 1,000 shares of capital stock of the said bank, and assessed the same to the individual owners thereof as moneys and credits, and assessed its real estate, consisting of the bank building, and lot, to the First National Bank, at a valuation

not less than the amount of capital stock of the bank invested therein, and the shares of the capital stock at not less than the book value of the same.

Third. That the assessor of the City of Estherville duly returned the assessment rolls, containing the assessment of the said 1,000 shares of said stock in said First National Bank of Estherville, to the respective owners thereof, in the manner required by law, thereafter, the City Council of the City of Estherville, sitting as a Reviewing Board and Board of Equalization, in regular session on the 16th day of April, 1906, whereat there were present the Mayor and a
31½ majority of the members of the city council, and more than a quorum for the transaction of business, on motion duly made, carried and entered of record in its minutes, raised the assessed valuation of the shares of appellants' capital stock and assessed for taxation to the several owners of shares of stock in said First National bank, after deducting from the assessment of said bank, the valuation of its real estate, said stock at the rate and valuation of $130.00 per share, upon each and every one of its 1,000 shares, and directed the City Clerk of the City of Estherville to give notice to all parties whose assessments were affected thereby, of the action of the Board of Review in raising their several assessments, and appointed April 26, 1906, at 9 o'clock A. M., for further hearing and final action thereon.

Fourth. That at the time and place fixed by the appellees, as said Board of Review, for final hearing and action upon assessment of shares of stock of said First National Bank of Estherville, E. B. Soper, attorney, and President of said First National Bank of Estherville, appeared before said appellees, as such reviewing board, for the said First National Bank, and also for all the stockholders of said bank, whose taxes would be affected by the action of the Board of Review, in raising the valuation thereof for taxation for said year, 1906, and objected to such action of said Board, and to the valuation fixed by them, as being in excess of the actual value of said stock, and exorbitant and unjust, and argued, and endeavored to convince the Board, that the taxable value of the shares of said stock in said First National Bank should be no greater sum, or more than the stockholders would receive if the bank was liquidated and its assets were converted into money, by the collection of its bills receivable and other assets and payment made of its liabilities, and that the proper, just and legal assessed valuation of its capital stock
31¾ is to be found by adding together the capital, surplus, and undivided profits of said First National Bank, and from the sum thereof subtracting the amount of the Bank's capital invested in real estate and dividing the remainder by the number of its shares of capital stock, and that such quotient would be the true assessable value of each share of stock; and that such assessed valuation of the stock of the First National Bank of Estherville could not be justly and legally fixed at a sum in excess of $112.00 per share.

Fifth. That thereupon and thereafter, the appellees, the City Council of the City of Estherville, sitting as a Board of Review as aforesaid, by resolution duly made, voted upon, carried and entered

of record in its minutes, fixed the assessment of the several share of holders owning said stock in said First National Bank of Estherville, (after deducting its real estate taxed to the corporation), at the assessed value of $130.00 per share, and ordered that the same be assessed and taxed for the year 1905, at such valuation.

Sixth. That thereupon and thereafter, on the 3rd day of May, 1906, the said First National Bank and its stockholders, whose names are herein set out, duly perfected an appeal from such action of the City Council of the City of Estherville sitting as a board of Review to equalize the assessment of property in the City of Estherville, to the District Court of Emmet County, Iowa, in order that such action of said Board of Review may be annulled and set aside, and that a proper and legal valuation for taxation of said stock of First National Bank of Estherville, be fixed and determined by said Court.

Seventh. Appellants further show to the court:—That the business of the said First National Bank of Estherville has for years past been conducted and managed with skill, energy and discre-
32 tion, and the management has earned for its stockholders, large profits and dividends and its stock is, and has been, by reason thereof, much sought after as an investment, and has even changed hands at a premium, much in excess of its book or actual value, and the appellees, the City Council of the City of Estherville, attempt to justify their action as a Board of Review, in the premises, on the grounds that such stock would be likely to sell, if offered in the market, for the amount at which its assessed valuation was fixed by the said Board of Review, if not for more money. But these appellants aver that any valuation of the stock above the actual value thereof is speculative, and dependent upon the earnings which may or may not, be made during the year 1906, and which are the results of business sagacity and business energy, which may, or may not be employed; and such qualities as are required to make a bank's business highly successful, and the bank profitable, ought not to be subject to taxation, and the stockholders ought not to be burdened by taxes by reason of unusually prudent and successful management.

Wherefore these appellants, the First National Bank of Estherville, and its stockholders herein named, pray that the action of the Board of Review may be set aside, and cancelled, and held for naught, and that the court fix the proper valuation of said stock for taxation for the year 1905, and that such assessment be reduced to $110.00 per share, and that the court make and enter all such other and further orders and judgments in the premises as may be just and equitable and that the appellants have judgment against the appellees for costs.

SOPER, ALLEN & ALEXANDER, AND
C. W. CRIM, *Attorneys for Appellants.*

Duly verified by Jno P. Kirby, Cashier of the First National Bank of Estherville, Iowa.

33 That at the August term of said court, the defendants filed in said cause

Appellees' Answer

as follows:

For answer to the appellants' petition, the defendants and appellees herein state:

First. That they deny each and every allegation of appellants' petition except those hereinafter expressly admitted:

Two. Appellees admit paragraph "One" of appellants' petition.

Three. Appellees admit all of paragraph "Two" of said petition except that they deny that the list of stockholders furnished the assessor was a complete list of all the names of the shareholders of said First National Bank and of the number of shares owned and held by each. Appellees admit that the assessor was furnished with a statement of the assets and liabilities of said bank, said statement being substantially the same as the one set out in appellant's petition, but the appellees deny that the statement furnished or the one set out in appellants' petition is a correct statement of the assets and liabilities of said bank at the date the same was furnished or at this time. Appellees also deny that the shares of capital stock were assessed by the assessor at not less than the book value thereof.

Four. Appellees admit all of paragraph Three of appellants' petition.

Five. Appellees admit that all the proceedings and acts alleged in paragraph four of appellants' petition, were duly had and performed, but these appellees deny that the taxable value of the shares of stock in the said First National Bank should be no greater sum, or more than the stockholders would receive if the bank was liquidated, and its assets were converted into money by the collec-
34 tion of its bills receivable and other assets and payment made of its liabilities, but allege that the taxable value of the shares is what their market and actual value was on the first day of January, 1906.

Further, appellees deny that the proper assessed valuation of its capital stock is to be found by simply adding together the capital and surplus and undivided profits of said First National Bank, and from the sum thereof subtracting the amount of the bank's capital invested in real estate, and dividing the remainder by the number of its shares of capital stock, and that such quotient would be the true assessable value of each share of stock.

Appellees deny that the taxable value of the stock of said bank should be no more than $112 per share, and state that $130, the taxable value as fixed by the city council as a Board of Equalization and Board of Review, is much below the actual and market value of said stock, and much below the taxable value of the same.

Six. Appellees admit the allegations of Paragraph Five of appellants' petition.

Seven. Appellees admit the allegations of Paragraph Six of appellants' petition.

Eight. Appellees admit the great skill and energy and discretion of the management of the First National bank; and admit that said Bank's stock has been much sought after, and admit that large profits and dividends have been earned for the stockholders; but deny that said stock has been changing hands at a greater value than the actual value; but allege that said stock has been changing hands at its actual and market value, and allege that values created by the business sagacity and business energy of the management of the First National Bank of Estherville, Iowa are entitled to no more consideration from the assessor and city council than are other values.

BYRON M. COON,
MYERLY & DAVIDSON,
Attorneys for Appellees.

Duly verified by Byron M. Coon, City Solicitor for Estherville, Iowa.

That thereafter the plaintiffs and appellants filed in said cause on the 5th day of September, 1906, their

Amendment to Appellants' Petition

as follows:

Comes now appellants herein and amend their petition heretofore filed herein by inserting immediately after the word "unjust", in the 10th line of Paragraph 4 thereof, the following:

And said stock is not assessed and valued in proportion to other like personal property in the City of Estherville, but is grossly in excess thereof, and unfair to these appellants and is unequal taxation.

C. W. CRIM AND SOPER,
ALLEN & ALEXANDER,
Attorneys for Appellants.

And thereafter on the same day, the defendants and appellees filed in said cause

Appellees' Answer to Appellants' Amendment to Petition

as follows:

Comes now the appellees herein and answering the amendment to appellants' petition in this cause, filed herein on the 5th day of September, 1906, and deny each and every allegation therein contained.

BYRON M. COON &
MYERLY AND DAVIDSON,
Attorneys for Appellees.

36 On the same day, to-wit: September 5, 1906, the parties hereto filed in the said cause their

Stipulation

between plaintiffs and defendants, as follows:

The assessor, Geo. Case in assessing the stock of the First National Bank of Estherville in 1905, assessed the same at par or one hundred cents which did not include the value of the real property, and that including the assessed value of the real property the stock was valued at approximately $1.14 or 14 cents above par.

BYRON M. COON AND
MYERLY & DAVIDSON,
Attorneys for Appellees.
C. W. CRIM AND
SOPER, ALLEN & ALEXANDER,
Attorneys for Appellants.

Trial of Cause

That the said cause came on for hearing and trial before the Hon. A. D. Bailie, presiding Judge, on the 5th day of September, 1906, the same being the 9th day of the regular August Term, A. D. 1906, of the District Court of the State of Iowa, within and for Emmet County; and

Thereupon the appellants in order to sustain the issues on their part offered the following evidence:

GEO CASE, called for appellants. Age 39 years, reside in Estherville; City Assessor. Did the assessing in Estherville during the winter of 1906. In assessing the First National Bank, Mr. Kirby handed me a paper showing the condition of the bank which was handed to the City Council. He gave me a list of the stockholders of the bank and later a statement of its condition. In making
37 the assessment of the other banks, Mr. James Espeset, gave me the items shown in the assessment roll. In assessing the Iowa Savings Bank, Mr. Converse, the cashier, gave me the items shown in the assessment roll of that bank. I have nothing relative to the assessment of those banks only the assessment roll. I am unable to find the statement that Mr. Kirby, cashier of the First National Bank furnished me. I have looked for it and was subpœnaed to bring that schedule with me. In assessing the value of the Iowa Savings Bank and Estherville State Bank, I assessed the value at the capital stock and surplus. I made no effort to ascertain whether the stock was above or below par. I met with the city council for the correction of errors and assessments after I had finished the assessment. I read over to them, the names of the tax payers among them, the Iowa Savings Bank and Estherville State Bank. The City Council did not ask for any statement or schedule that I might have had in fixing the value of their stock and did not interrogate me as to how the value was fixed.

Witness shown assessment roll of 1905 marked plaintiffs' Exhibit "A" and testified that it is duplicate rolls returned by him which is assessment roll No. 5 of the City of Estherville for 1905.

Witness identifies No. 445 of Exhibit as the assessment roll of the Iowa Savings Bank, the original, and states that the same was made out at the time of assessing the Iowa Savings Bank and that the same was returned by him and used by the Board of Equalization or City Council for the correction of errors and assessments.

Witness identifies No. 450 thereof as assessment roll for 1905 of the Bank of Estherville, and states that the same was made out by witness and signed by the cashier when he assessed the bank and is the same as used by the City Council.

38 Witness identifies No. 466 of said Exhibit A as the assessment roll for 1906 of the Estherville State Bank and states that it was made by him at the time of assessing the bank and was used before the City Council when sitting as a board for the correction of errors and assessments.

Appellants here offer in evidence Nos. 445, 466 and 450 of plaintiff's Exhibit A being the numbers thereof to which the witnesses' attention have been directed, which said exhibits are as follows:

No. 445. Assessment Roll, 1906, Estherville Township, Emmet County.

MARCH 6, 1906.

Iowa Savings Bank, Estherville, Iowa:

Capital Stock	$50000.00
Surplus	10000.00
Total moneys and credits	60000.00

Liabilities:

Amount of notes	15000.00
Net amount of moneys and credits	45000.00

(Signed) IOWA SAVINGS BANK,
F. W. CONVERSE.

Subscribed and sworn to this 6th day of March, A. D., 1906, before me.

GEO. CASE, *Assessor.*

Assessment:

Total Actual Value, personal	45000.00
Total taxable value, personal	11250.00

No. 463. Assessment Roll, 1906, Estherville Township, Emmet County, Iowa.

MARCH 6, 1906.

Estherville State Bank, Estherville, Iowa:

Capital		50000.00
Surplus		10000.00
39	Total moneys and credits	60000.00
	Bank Lots	14000.00
Other lands		6000.00
Total amount of debts		20000.00
Net amounts moneys and credits		40000.00

(Signed) ESTHERVILLE STATE BANK.
JAMES ESPESET.

Subscribed and sworn to this 6th day of March, A. D., 1906, before me,

GEO. CASE, *Assessor.*

Assessment:

Total actual value, personal,	40000.00
Total taxable value, personal	10000.00

No. 450. Assessment Roll, 1906, Estherville Township, Emmet County.

1906.

Bank of Estherville, F. H. Rhodes & Co., Estherville, Iowa:

Aggregate amount of notes	189158.65
Aggregate amount of money in bank,	35698.42
Total moneys and credits	224857.08

Liabilities:

Total amount of notes	5000.00
Total amount of deposits	211856.06
Total amount of debts	216856.06
Net amount of moneys and credits	8001.01
Bank furniture	1998.99

(Signed) BANK OF ESTHERVILLE.
E. H. RHODES, *Cashier.*

Subscribed and sworn to this — day of —— A. D., 1906, before me,

GEO. CASE, *Assessor.*

Assessment:

Total actual value, personal,	10000.00
Total taxable value, personal,	2500.00

40 To each of the above numbers in said exhibit A, offered in evidence, appellees by their attorneys object as incompetent, immaterial, irrelevant.

Q. In making these assessments, were these numbers in the exhibit to which I have called your attention, numbers 445, 466, 450, made up by you from the statements given you at the time, by the officers of the respective banks?

To which question the appellees object as leading.

A. Yes, sir. I had no other information in assessing those banks other than that given me by the respective cashiers. In making up the assessment of these banks, I made the same from *from* the assessment rolls.

It is agreed by the plaintiff and defendants that plaintiffs' exhibit B, is the assessment book upon which the assessments of the property in the City of Estherville was made by the assessor and returned to the proper authorities for the year 1906 and are the same and correspond to the numbers in the assessment roll which has been offered in evidence.

At this time, the appellants offer in evidence, plaintiffs' Exhibit B, and particularly offer in evidence No. 450 on page 60 of said book and No. 466 of the Estherville State Bank on page 13 and No. 445 of the Iowa Savings Bank on page 23. To which offer appellees object as incompetent, immaterial and irrelevant.

The portion of plaintiffs' Exhibit B offered in evidence corresponds with and are the same in substance as the corresponding numbers set out from plaintiffs' Exhibit A found on pages (14 and 15) of this abstract.

Cross-examination:

Q. Now I believe you testified that at the time you made the assessment of the First National Bank, that Mr. Kirby furnished you a list of the assets of the bank?

41 A. No, not at that time but shortly afterwards.

Q. As a matter of fact, he did not furnish any until after you had returned your assessment to the City Council?

A. I think it was before that.

Q. And had he furnished that before you made up the assessment of the First National Bank property or First National Bank stock?

A. Well, Yes, before the final assessment was made.

I think I got the statement before I made the assessment but I didn't get the statement at the time I got the list of the stockholders. I do not know whether I assessed the stockholders before I got this statement from Mr. Kirby or not. I got the matter or data from which I made the assessment of the property of the Bank of Estherville from the statement furnished by the bank. I arrived at the value of the property of the Iowa Savings Bank in the same way and also of the Estherville State bank. I made no reference at all to the assessment of the Estherville State bank, Iowa Savings Bank and Bank of Estherville for the previous year. I think I referred to them afterwards to see what they were. I think it was the same. I am sure that I made up the amount and put the amount on the as-

sessment roll that I assessed each of those banks, before I referred to the assessment of the previous year.

Witness excused.

JOHN P. KIRBY, called on behalf of appellants.

Name, John P. Kirby; live in Estherville; 39 years old; have been cashier of the first National Bank of Estherville about 14 years. I know Mr. Case, the assessor. I gave Mr. Case the statements showing the condition of the First National Bank of Estherville on January 1, 1906. I do not remember of giving him a statement
42 of the condition of the bank only as he returned in the assessment roll. I made him an itemized statement of the condition of the bank. I do not remember the date it was given. He called for it and I made it up for him in the spring of 1906 prior to the meeting of the City Council as a Board of review, in the spring of 1906. I gave Mr. Case a statement of the assets and liabilities of the bank at the time we made the assessment and mine personally at the same time and afterwards I made him a statement and he told me that he had a financial statement of the bank to get for the city council and we furnished it for him ready for the next time he called. No, I haven't a duplicate of the statement that I furnished him. I have a statement of the condition of the bank at that time.

Witness handed the petition in this case and his attention called to the statement incorporated in paragraph two of the petition and witness asked to examine the same and state whether or not the same is a true copy of the statement furnished by him to Mr. Case. Witness answers, yes sir, I think it is practically the same. The statement I furnished Mr. Case of the condition of the First National Bank showed the true condition of the First National Bank on the First day of January 1906. The statement incorporated in paragraph two of appellants' petition contains a true and correct statement of the condition of the First National Bank on the first day of January 1906. The capital stock of the First National Bank on the First day of January 1906, was $100000.00 The surplus fund was $20000.00. The bank building owned by the bank in which the business is conducted stands on the books at $12500.00. $12500.00 of the capital stock of the First National Bank was actually invested in real estate on that date. In the re-organization of the bank about four years ago, we valued the building at that price. I would have to go back to the books to see what the original
43 value of the building was. If I remember correctly it cost us $5500.00 for the lot and $8000.00 for the building.

It is admitted by appellants and appellees herein that the real estate of the First National Bank, being the building and lot on which the bank business was conducted, was assessed for the year 1905 at $14000.00 and the assessment of $14000.00 for 1905 is the assessed valuation thereof for the year 1906.

Cross-examination:

Q. The first item of the resources of the bank is called "Due from banks $13754.30; bills receivable owned by the bank $396198.05; now that is the face of the bills receivable that the bank held at that time?

A. Yes sir.

Q. That did not include any accrued interest on these bills receivable did it?

A. No sir.

Q. As a matter of fact, upon the first of January 1906, the date of this statement which you say you rendered to the assessor, there was a large amount of accrued interest on these bills receivable which was not included in that item?

A. No sir.

Q. Any accrued interest.

A. Some.

Q. The U. S. Bonds to secure the circulation, $25000.00. That was the correct amount?

A. Yes sir.

Q. Redemption fund U. S. Treasury, $1200.00.

A. Yes sir.

Q. Overdrafts $6737.20; cash on hand in bank $24471.83. Now had any dividends been struck upon the stock by the bank at that time which had not been paid over to the stockholders on the first day of January 1906?

44 A. There was one dividend that had not been paid.

Q. One dividend.

A. Yes sir.

Q. When was that made by the bank?

A. It was made the last quarter of 1905.

Q. And that hadn't been paid.

A. No sir.

Q. And now what kind of a statement did you give as to that dividend at that time?

A. I think I put it in as dividend.

Q. You put that in as a liability didn't you?

A. Yes sir.

Q. The bank simply owed that much on the stock at that time to the stockholders.

A. Yes sir.

Q. Now one of the liabilities itemized at that time is surplus fund $20000.00.

A. Yes sir.

Q. Another item under the head of undivided profits, $1994.90.

A. Yes sir.

Q. That is correct. That was simply due to the stockholders that hadn't been set apart by declaring dividends.

A. Yes sir.

Q. You now state that the statement rendered at the time that was read off here, as we read in paragraph two of this petition is correct?

A. Practically correct. The difference is undivided profits there is a few dollars; less than $20.00.

Q. Haven't you set apart or carried in your bank, a building fund?

A. No sir.

Q. Don't you set apart any money as a building fund?

A. No sir.

45 Q. And no other items set apart that are not mentioned in here particularly are there.

A. No sir.

Q. Any set apart as a sinking fund or security fund or fund to secure against loss.

A. No sir, we have charged out the losses out of the year's earnings.

Q. Then if you had any on hand, any paper that you didn't consider good you didn't itemize it in this statement?

A. Any items was charged out by the board of directors in former years.

Q. Well that don't quite answer the question.

A. We have no items; we had items of course that were lost that were charged out.

Q. Had some of that old bad paper on hand?

A. Yes sir.

Q. That wasn't included in this.

A. No sir.

Q. About how much did you have on hand?

A. It may be a few thousand dollars.

It is agreed by and between the appellants and appellees herein that the First National Bank of Estherville had on the first day of January 1906 and at said date $12500.00 of its capital stock invested in real estate.

Witness excused.

F. W. CONVERSE, called in behalf of appellants.

Name F. W. Converse, age 28; live in Estherville, Iowa, cashier of the Iowa Savings Bank, since January 5, 1905. Am the Converse who gave the Assessor, Geo. Case a statement of the bank for purpose of taxation in the year 1906. I have a copy of the statement furnished the assessor.

46 Witness produces same. The statement produced by witness marked plaintiff's Exhibit C., contains all the statements furnished the assessor at the time of making the assessment.

It is agreed by the plaintiffs and defendants that Plaintiffs' Exhibit C., is a duplicate copy of assessment roll No. 445 which was identified by the assessor and is set out on page 14 of this abstract.

I have not a statement with me of the bank on the first day of January 1906 and can not give the items without looking at the books.

Q. What was the amount of bills payable by your bank on the first day of January 1906?

A. We put in $15000.00 which was the actual amount.

Q. What was the actual value of bonds and stocks of every kind

and shares of capital stock or joint stock of other corporations or companies held as an investment by your bank or in any way representing assets which were owned by the bank on the first day of January, 1906?

A. I can not give those items without a statement. I can ascertain from the books of the bank.

The capital stock of the bank on the first day of January 1906 was $5000.00 divided into 500 shares of one hundred dollars each and the surplus was $10000.00. There was substantially no undivided earnings. The $15000.00 put in as liabilities was money owing by the bank on land in Dickinson County, Iowa. The bank owned land at that date. The surplus that we have on hand is money. We simply deducted what we owed from capital and surplus and gave no credit for the land itself.

Q. Will you at this time proceed to your bank and ascertain the statement and condition of your bank in answer to the questions which I have just asked you which have not been answered by you?

A. Yes sir.

47 F. W. CONVERSE re-called by appellants.

Q. Have you prepared the statement for which I asked you?

A. Yes sir.

Witness produces statement, marked by the reporter plaintiffs' Exhibit D., and was asked.

Q. This is the statement showing the condition of your bank on the first ray of January 1906?

A. Yes sir.

Appellants offer the same in evidence as part of the examination of the witness, Converse, which statement, reporters plaintiff's Exhibit D, is as follows:

Bills receivable	$166,608.88
Overdrafts	3,181.01
Furniture & Fixtures	3,399.84
Amount subject to be drawn on sight on deposit with solvent banks and bankers	12,490.34
Cash & Cash items	11,127.05
Advanced money on Ins	274.30
Total resources	$197,081.42
Capital stock	50,000.00
Surplus	10,000.00
Undivided profits	12.00
Deposits	131,211.86
Dividend fund	5,000.00
Amount set aside for taxes and expenses	857.56
Total liabilities	$197,081.42

M. J. GROVES, on behalf of appellants.

Name, M. J. Groves, age 36, residence Estherville, occupation lawyer and president of insurance company; mayor of city of Estherville during the year 1906. Presided as chairman of review
48 board of City of Estherville and was presiding at the time assessment of the First National Bank of Estherville and others were corrected.

Q. Now in equalizing assessments, what did you know in regard to equalizing the assessments between the several banks.

A. We equalized them to the best of our judgment.

Q. How?

A. With the Iowa Savings Bank; I am a director there and know the affairs of the bank. I know what the stock has been selling for; I knew the dividends they paid; and I knew the general condition of the bank and we assessed the stock at $120 a share. With regard to the Estherville State Bank all I knew was what I knew from the papers and what the officers of the bank had told me. We assessed that bank at $120 per share. The First National Bank, we assessed at $144, $14 on each share being for real estate and $130 for money. The Capital stock of the Iowa Savings Bank was $50,000.00. We assessed at $120 per share. It had paid 10 per cent dividends annually. It had $10000.00 surplus. There was very little earnings on the first of January. I am a director of the bank and familiar with its condition. The $15000.00 deduction was made for a farm owned by the bank over in Dickinson County. There was a farm loan on the farm when we got it which I think was assumed by the bank. I didn't say that we changed the assessment of the Iowa Savings Bank from that made by the assessor. I said we assessed the Iowa Savings Bank stock $120 per share, what the assessor listed it at I do not remember. The last transfer of stock of the Iowa Savings Bank made previous to the sitting of the board of equalization was at $137.50 per share.

Cross-examination:

49 Q. Did you ascertain at the time you were sitting with city Council as a board of equalization what the bank stock of the First National Bank had been selling for?

Objected to by appellants as not proper cross examination, immaterial, irrelevant and incompetent and not the proper basis to ascertain the value of the property for taxation purposes.

A. I did so before.

Q. Now at what had that been selling at?

Appellants make the same objection as last above, also that it is not shown that witness knows or had any personal knowledge.

A. $175.00 per share.

Q. Did you make some investigation as to what the shares of the defendant bank that you referred to, are selling at or were sold at?

Appellants make same objection as last above

A. I did.

Q. And you found that the stock of the First National Bank had been selling at how much?

Appellants make same objection as last above.

A. $175.00.

Q. And the stock of the Iowa Savings Bank had been selling at what?

A. A recent transfer had been made at $137.50.

Q. Now in making your assessments upon the stock of the savings bank you have referred to, state whether or not you attempted to equalize them in proportion to the rise in value?

To which question the appellants object as calling for a conclusion of the witness.

A. We did. I might in addition to that answer to that question say that we gave the First National Bank the benefit over the other two banks; that is we scaled down the assessment of that bank further than any other in proportion to the assessment levied, as to
50 what the shares were selling at, and which they were bringing on the open market.

Appellants now move to strike the answer of the witness as incompetent, immaterial, and irrelevant.

Q. In making the assessment of the valuation of the stock of the savings bank you have referred to, how did you attempt to value them; in what way; what kind of a value did you place on them?

A. We aimed to assess them at such an amount as would be fair between all the banks and such an amount as would not work an injustice on either bank, or the owners of the stock, they could realize the same as any other moneys and credits, the same as though they were dollars.

Appellants move to strike the answer of the witness as incompetent, immaterial, irrelevant and a conclusion and opinion of the witness.

Q. In arriving at your basis of assessment state whether or not you attempted to place upon them or the different shares their actual value or not?

Same objections.

A. To the best of our judgment, yes sir.

Redirect examination:

Q. Have you any personal knowledge of what the shares in the First National were selling at?

A. I have the word of the cashier, and some of the others have told me. I have the word of a good many who bought stock and some who sold it.

I never have bought or sold any myself. The stock of all of the banks are pretty readily sold. You can find a market any time. There is no market fixing the price. There is no stock exchange here. There is a market the same as for any commodity.

51 Q. When you speak of any other commodity, you meant find a sale for?

A. No sir, I do not consider bank stock that way.

Q. What do you consider it?

A. I consider the bank stock of the banks in this city, from what I know about it whose money is just as good as money, and all dirt cheap at the price they are up at.

Q. Isn't it a fact that these sales that you speak of are largely speculative?

A. No sir, I don't consider it is.

Q. It is based upon transfers of the future?

A. No sir, I do not consider it so.

Q. It depends also upon how anxious some men might be to get a controlling interest or get on the inside?

A. I do not consider it in that way.

Q. Then you think in case of a division of banks where it is equally divided, that the fact of the controlling of the bank wouldn't have anything to do with the sale of the stock?

A. It might possibly in certain instances.

Q. Take it in the bank in which you are a director, the stock is not for sale?

A. No, the stock is not for sale.

Q. Is the stock of the bank in which you are interested and in which you are a director at this time, for sale?

A. No sir, not that I know of.

The appellants at this time move to strike out the testimony of the witness Groves as to the market value or the actual value of the First National Bank stock for the reason that the testimony of the witness shows that he has no actual knowledge of the market value or actual value thereof, and for the further reason his testimony in regard thereto is immaterial, irrelevant and incompetent, and the witness has not shown himself competent to testify as to the actual market value of said stock, and further that the testimony of the wit-
52 ness shows that his knowledge of the value, actual value, and market value of said stock is derived from what others told him, and that he has no personal knowledge in regard to the matter and based on what others have told him as to the sale of the stock.

Witness excused.

JAMES ESPESET, called on behalf of the appellants.

Name, James Espeset, age 44, residence, Estherville; cashier of the Estherville State Bank. I do not have with me a statement of the condition of the Estherville State Bank on January 1905.

Q. At the time your bank was assessed by the Assessor for Estherville, did you furnish a verified statement showing the amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash not included in either of the preceding items, and other statements contained in section 1321 and 1322 of the code of Iowa?

A. I did not all the data I furnished was all that he asked for.

Witness asked to bring a statement of the condition of the Estherville State Bank on January 1, 1906 and upon his return was asked:—

Q. Have you with you a statement showing the condition of your bank on January 1, 1906?

A. Yes sir.

Q. Will you produce it?

Witness produces statement identified by the reporter as plaintiffs Exhibit F, as follows:

53 "*Statement of the Condition of the Estherville State Bank at the Close of Business Dec.* 30, 1905.

Resources:	
Bills receivable	$138,071.10
Cash on hand and in banks	52,596.79
Real and personal property	19,718.96
Overdrafts	7,397.55
Total	$217,784.40
Liabilities:	
Capital stock	50,000.00
Surplus	10,000.00
Undivided profits	4,125.14
Deposits	153,659.26
Total	$217,784.40

Q. Mr. Espeset in the item marked real and personal property, how much of that will you separate into real and personal property? Give the value of each, showing how much is personal property and how much is real estate?

A. I think the books show in the neighborhood of $3000.00 of personal property. It is between two and three thousand dollars; about twenty five hundred, I would say without referring to the books.

At this time the appellants offer in evidence plaintiffs' exhibit F, being the statement of the Estherville State Bank on January 1, 1906, as produced and testified to by the witness Espeset.

To which the appellees object as immaterial, irrelevant and incompetent.

Appellants rest.

54 *Appellees' Evidence.*

H. C. Coon, a witness on behalf of appellees.

Name, H. C. Coon; age 63 years, resides at Estherville and has resided there nearly 40 years. Owned some stock of the First National Bank about a year ago. I acquired those shares from James Fletcher. I do not know what I paid for this stock. This bank stock I had was something I attached. I sold the bank stock to John Montgomery about a year ago. I know how much Mr. Montgomery paid for it.

Q. How much did he pay you for it?

To which the appellants object as incompetent, immaterial and irrelevant and for the further reason that statutes, sec. 1331 and 1332 of the code provide what shall be taken into consideration in fixing the value of national bank stock and other bank stocks for the purpose of taxation, and the testimony of this witness does not constitute any item mentioned in said sections and is not material in fixing the valuation of bank stock for the purpose of taxation under the laws of the state of Iowa, and for the further reason the amount at which the witness sold the stock for is not a measure of its valuation for the purpose of taxation.

A. $175.00 per share.

Q. Did you receive the cash for it.—the money?

Same objection as last above.

A. Yes sir.

Q. How many shares?

A. Ten.

I have known Mr. Montgomery nine or ten years. I do not know what business he was in particularly. I always supposed he was in the land business.

Witness excused.

55 M. J. Groves, re-called on behalf of appellees.

Q. Do you know John Montgomery?

A. I do.

Q. The party to whom the witness testified he sold that stock?

A. Yes sir.

Q. Do you know whether he is an officer of the First National Bank?

To which question the appellants object on the ground that it is incompetent, immaterial and irrelevant.

A. Yes sir.

Q. How long has he been an officer?

A. Something like two years or may be a little longer than that.

Appellees rest. Appellants rest.

Testimony closed.

At this time the appellants and appellees having rested and the testimony being closed the appellants move the court to strike out all of the testimony of the witness Coon as to the sale made by him of stock in the First National Bank for all of the reasons urged in the objections to the questions put to him in relation thereto, and for the further reason that the testimony does not show that the city council, acting as a board of equalization or board of review, had any knowledge of the particular sale testified to by the witness Coon, or that they had any knowledge of any particular sale or any knowledge as to what the stock in the First National Bank had sold for, at the time the assessment was made and there is no testimony before the court to show what knowledge the board of review had in relation to the sale of stock or the value thereof.

56 After argument of counsel the cause was submitted to the court and the court took the same under advisement and thereafter during the October Term 1906 of the District Court of the State of Iowa, within and for Emmet County, and on the 10th day of November 1906, the court made and filed in said cause, his

Findings of the Court

which said findings are as follows, to-wit:

This cause coming on for hearing on appeal from the action of the Board of Review, the court after hearing the evidence and arguments of counsel and being advised in the premises finds as follows:

1. That the appellees as a board of review in passing upon the action of the assessor of said city in valuation of the corporate shares of stock in said national bank for the purposes of assessment and taxation increased and fixed such valuation, after deducting the real estate owned by the bank, at $130 per share.

2. From this action the said bank appealed to this court and in its original petition presents the single question of the valuation of its stock for purposes of assessment; but in an amendment the further issues presented as to alleged inequality of the said assessment made by said board when compared with other property of like character.

3. Concerning the issue tendered by the amendment it is enough to say that there does not appear to be sufficient evidence in the record of such an inequality, in the relative valuation of the shares of the several banking institutions of said city, as would warrant this court in disturbing the action of the Board of Review upon that ground, as in the very nature of things absolute exactness and equality cannot be obtained.

4. This leaves to be determined the question as to whether
57 the valuation fixed by said Board of Review upon the shares of stock in said national bank is just and fair and the true valuation.

It is claimed by the appellants that the Board of Review is not warranted under the statute in arriving at the taxable value of bank shares, in considering other elements than the capital invested, the surplus and the undivided profits as they existed on the first day of January; while it is the contention of the appellees on the other

hand that the board may take into account, in arriving at such taxable value, not only the capital, surplus and undivided profits, but any and all other elements as under the evidence may tend to show the actual value of the shares.

This is the vital question in this case. Appellees answer admitting that the proceedings had in all other respects, aside from this and the question of inequality of assessment among the several banks, were regular.

It was made to appear in the arguments of counsel on both sides that it is desirable to have determined the proper course to be pursued in the future, in fixing the valuation of bank shares for purposes of assessment and taxation.

As above stated, it is contended by the appellants that the taxable value of the shares of stock should not be fixed at a greater sum than the stockholders would receive if the bank were to go into liquidation, and its assets converted into money and that the capital invested added to the surplus and undivided profits, or in other words the book value of the shares, should alone be considered in arriving at the true valuation.

Answering the first of these contentions it would seem that the value of the shares must be considered as in a going concern, as the evidence shows this bank to be, and not in an institution closed and going out of business.

58 The evidence produced by the appellants shows that the capital invested was a dividend producer to the extent of ten per cent. per annum in the preceding year.

It is undoubtedly due to the most excellent management of this bank that makes it so profitable a venture, and productive of such ample returns to its owners, and in arriving at the true value of the shares of stock therein, it is proper for the taxing powers to take into account the condition of the institution, its dividend producing power as well as the capital and surplus.

Section 1322 of the code 1897 provides that "as an aid" in fixing the value of such shares the corporation shall furnish a statement to the assessor which shall, among other things, show the capital stock, surplus and undivided earnings, and the assessor upon such statement "and other information he can obtain" shall fix the value of such stock, taking into account the capital, surplus and undivided earnings, and after deducting the value of the real estate owned by the bank, thus fix the value of the shares.

This section of the statute in providing that the assessor may consider "other evidence" in fixing the valuation would seem to render competent to be here considered the evidence produced upon the trial, of the true or actual market value of the stock.

Our revenue acts provide that all property shall be assessed at its actual value and for purposes of taxation the terms "actual value" and "market value" are synonymous.

In the case of the *Bank of Albia vs. City Council*, it is held that the actual value of the stock diminished by the proportionate value of the real estate owned by the bank furnishes the proper sum upon which to assess the tax. *Bank of Albia vs. City Council*, 86 Ia. 28.

The statutes of New York upon this subject are similar to our own, and the court of appeals in that state hold that "the assessor in the discharge of his duties must ascertain the value of the shares
59 in banks, and to that end he must take into consideration every element that gives value to the shares; the surplus and the circumstances under which it exists; the franchises, advantages and disadvantages of the bank, and all other circumstances, and when he thus ascertains the value of the shares, such value is the basis of assessment and taxation.

People et rel Gallatin National Bank vs. Commissioners, 67 N. Y. 516. In this case, in addition to the evidence produced by the bank statements furnished the assessor, there was evidence that the shares were actually worth in the market largely in excess of the valuation fixed by the board of review, and in the absence of evidence to the contrary, which in this appeal, it was incumbent upon the appellants to produce, such valuation as fixed by the board of review should stand; and a record entry may be prepared accordingly, preserving to appellants their exceptions.

A. D. BAILIE, *Judge.*

That thereafter on the 20th day of November, A. D. 1906, there was filed in said cause a

Decree

pursuant to the findings of said court as follows:

Now, to-wit on this 6th day of September, 1906, it being the 10th day of the regular August term of the District Court of Iowa, in and for Emmet County, the above entitled cause came on in its order for hearing and determination by the court, Soper, Allen & Alexander appearing for the appellants and Bryon M. Coon and Myerly & Davidson appearing for the appellees.

Thereupon the court having inspected the pleadings and files in the case, finds that the City Council of the City of Estherville,
60 Iowa, was duly served with a notice of the appeal by the First National Bank of Estherville, and the stockholders of the said bank, and that their appeal was duly perfected, from the action of the said city council sitting as a Board of Equalization and Review in fixing the value of the corporate shares of the said bank for the purposes of taxation at the sum of One Hundred Thirty Dollars.

Thereupon the appellees, the said City Council of Estherville, Iowa, having appeared and filed their answer, the court finds that the subject matter of the said suit and the city council of Estherville, Iowa, and the members of the said council are within the jurisdiction of the court and it is thereupon ordered that said cause proceed to trial on the issues as raised by the respective parties to the said action.

Thereupon said cause is tried to the court; and the court having heard the evidence and proofs of the respective parties, and having read the pleadings, filed in the said cause, and having heard the arguments of counsel on both sides, and having been fully advised in the premises, the court, with the consent of both appellants and

appellees, takes the case under advisement and agrees to announce his decision during vacation.

And thereupon on the 10th day of November 1906, the court after having carefully considered the evidence and proofs and pleadings and arguments of counsel, files in the said cause his findings according to which the court decided:

1. That the appellees the city council of the City of Estherville, Iowa, sitting as a board of Equalization and Review in passing upon the action of the assessor of said city in the valuation of the corporate shares of stock in said National Bank for the purposes of taxation, increased and fixed said valuation, after deducting real estate owned by the bank, at One hundred Thirty Dollars per share.

61 2. That the record in said cause does not show such an inequality in the relative valuations of the shares of the several banking institutions of the said city, as would warrant the court in disturbing the action of the Board of Equalization and Review on that ground.

3. That the value of the shares must be considered as in a going concern, and not in an institution closed and going out of business. And that the evidence in this case shows the said National Bank to be a going concern.

4. That the evidence shows that the capital invested was a dividend producer to the extent of ten per cent. per annum, in the preceding year, and in arriving at the true values of the shares of stock therein, it is proper for the taxing powers to take into account the financial condition of the institution, the dividend producing power, as well as the capital and surplus.

5. That section 1322 of the Code of Iowa, of 1897 provides that "as an aid" in fixing the value of such shares the corporation shall furnish a statement to the assessor which shall among other things show the capital stock, surplus and undivided earnings, and the assessor upon such statement "and other information he can obtain" shall fix the value of such stock taking into consideration the capital, surplus and undivided earnings, and after deducting the value of the real estate owned by the bank, thus fix the value of the shares, and that the proper construction of said section of the code would render it competent to be considered in determining the matters in controversy in this action, the evidence produced upon the trial thereof, of the true, or actual, or market value of the said stock. And that the terms "actual value" and "market value" are synonymous, and the court further finds that according to the laws of Iowa, all property shall be assessed at its actual value.

62 7. That the actual value of the stock, diminished by the proportionate value of the real estate owned by the bank, furnished the proper sum upon which to assess the tax.

8. That on the trial of this cause evidence was produced by appellees to show, and which did show, that the shares of stock in said National Bank were actually worth in the market largely in excess of the valuation fixed by the Board of Equalization and Review, and that the valuations fixed by the said Board should stand in the absence of evidence on the part of the appellants on the contrary to

show that the actual value of the stock was less than that fixed by the Board of Equalization and Review; and that upon this appeal it was incumbent upon the appellants, in view of the evidence produced by the appellees as to the actual value of the stock, to produce evidence to show that the actual value of the stock was less than contended for by appellees which was not done.

9. That the valuation fixed by the Board of Equalization and Review should stand.

10. That all the proceedings had by the city council of Estherville, Iowa, sitting as a board of Review and Equalization, in the matter of assessment of the shares of stock of the said national bank were regular.

It is Therefore, Adjudged, Ordered and Decreed that the City Council of the City of Estherville, Iowa, sitting as a Board of Equalization and Review, in passing upon the action of the assessor of said city in the valuation of the corporate shares of stock in the First National Bank of the City of Estherville, Iowa, for the purposes of assessment and taxation, did increase and fix such valuation after deducting the real estate owned by the bank at One Hundred Thirty Dollars per share.

63 And it is further ordered, adjudged and decreed that in fixing the valuation of the said National Bank shares at said sum, the said city council did act fairly, justly, impartially and without discrimination, and that the action of the said city council did not create such an inequality in the relative valuations placed upon the shares of the several banking institutions of the said city as would warrant the court in disturbing the action of the Board of Review and Equalization, and that the city council obtained such a degree of exactness and equality as the circumstances of the case would allow. That the value of the shares must be considered as in a going concern and not be fixed at such sum as the stockholders would receive if the bank were to be liquidated and its assets turned into money. That the appellant, the said National Bank was on the first day of January 1906, a going concern.

It is further ordered, adjudged and decreed that the actual market value of the said national bank shares was largely in excess of the valuation fixed by the board of review; namely one Hundred Thirty Dollars per share, and that the valuation fixed by the board of review should stand, and the said shares of stock of the said First National Bank of Estherville, shall be entered for taxation at a valuation of $130.00 per share as determined by the said city council. That the costs of this action be taxed to the appellants.

To all of which the appellants except and object.

A. D. BAILIE,
Judge of the 14th Judicial District, Iowa.

That thereafter on the 8th day of December A. D. 1906, the plaintiffs and appellants herein duly perfected an appeal to the Supreme Court of Iowa, by serving upon the defendants and appellees and upon the clerk of the District Court of the State of Iowa within and for Emmet County, a

64 *Notice of Appeal*

and securing to said Clerk the costs of a transcript in case such transcript should be required.

SOPER, ALLEN & ALEXANDER AND
C. W. CRIM,
Attorneys for Plaintiffs and Appellants.

65 In the Supreme Court of Iowa, January Term, A. D., 1907.
In Equity.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, EMMA G. ALLEN, F. EDWARD ALLEN, P. L. CHRISTENSEN, C. W. CRIM, JANET T. CLAY, ESTATE OF HENRY G. GRAAF, EMMA C. LOUGH, ALSEY ANN LOUGH, G. H. MORSE, O. H. MCCARTY, A. D. ROOT, G. S. RINGLAND, A. A. RINGLAND, MARY E. SKINNER, E. I. SONDROL, LULU A. BROWN, M. G. WILSON, L. A. WATSON, and ROBERT WILLIAMS, Appellants,

vs.

THE CITY COUNCIL OF ESTHERVILLE, Sitting as a Board of Equalization and Review, Composed of M. J. GROVES, Mayor; A. O. MEAD, W. ROBB, A. C. BROWN, J. T. JOHNSTON, H. O. SILLGE, C. HENKINS, Members of the City Council of Estherville, Appellees.

Appeal from the Judgment of the Emmet District Court.

Hon. A. D. Bailie, Presiding Judge.

Soper, Allen & Alexander and C. W. Crim, Attorneys for Appellants.

Byron M. Coon and Myerly & Davidson, Attorneys for Appellees.

Appellants' Amendment to Abstract.

Due and legal service of the within Appellants' Amendment to Abstract is hereby accepted this — day of January, A. D., 1907.

——— ———,
Attorneys for Appellees.

66 Appellants herein amend their Abstract of the record herein:

First, by inserting on page 31 thereof, immediately following the words "Testimony Closed" the following:

And the foregoing is the evidence and all of the evidence offered, given or received on the trial of said cause, with all objections thereto, and the same was at the hearing duly taken down in writing by the official shorthand reporter and duly certified by the trial judge as being all the evidence and duly made a part of the record in said cause.

Second. The appellants herein expressly re-affirm the correctness of the date of the service of the Notice of Appeal by the sheriff of Emmet county, Iowa, upon the mayor of the city of Estherville, to-wit: May 3rd, 1906, and aver that May 14, 1906, is the date when the Notice of Appeal from the action of the Board of Review and Equalization was filed in the clerk's office and the appeal docketed.

Third. The appellants deny that appellees' Amendments to Appellants' Abstract are necessary or material; and deny that any of the corrections made in said Amendment to Abstract changes any material evidence offered upon the trial from what is set out as such evidence in Appellants' Abstract.

Fourth. The appellants re-affirm that all of the pleadings, and all of the evidence, filed in the case, and offered upon the trial of this cause in the District Court, are fully set out in Appellants' Abstract, and that the same, together with the corrections of immaterial errors made by Appellees' Amendments to Appellants' Abstract, set out the whole record in the court below, full, perfect and complete.

SOPER, ALLEN & ALEXANDER,
Attorneys for Appellants.

67 In the Supreme Court of Iowa, January Term, A. D., 1907.
In Equity.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, EMMA G. ALLEN, F. EDWARD ALLEN, P. L. CHRISTENSEN, C. W. CRIM, JANET T. CLAY, ESTATE OF HENRY G. GRAAF, EMMA C. LOUGH, ALSEY ANN LOUGH, G. H. MORSE, O. H. MCCARTY, A. D. ROOT, G. S. RINGLAND, A. A. RINGLAND, MARY E. SKINNER, E. I. SONDROL, M. G. WILSON, LULU A. BROWN, L. A. WATSON, and ROBERT WILLIAMS, Appellants,

vs.

THE CITY COUNCIL OF ESTHERVILLE, Sitting as a Board of Equalization and Review, Composed of M. J. GROVES, Mayor; A. O. MEAD, W. ROBB, A. C. BROWN, J. T. JOHNSTON, H. O. SILLGE, C. HENKINS, Members of the City Council of Estherville, Appellees.

Appeal from the Judgment of the Emmet District Court.

Hon. A. D. Bailie, Presiding Judge.

Soper, Allen & Alexander and C. W. Crim, Attorneys for Appellants.

Byron M. Coon and Myerly & Davidson, Attorneys for Appellees.

Appellees' Additional and Corrected Abstract.

Due and legal service of the within abstract is hereby accepted this — day of December, 1906.

———, ———,
Attorneys for Appellants.

68 The appellees deny that the abstract of the appellants contains all of the evidence offered on the trial of said cause, and deny that the appellants' abstract is correct and set out the few particulars in which it omits the evidence, and is incorrect.

In the first line of page two of appellants' abstract, the words "On the 3rd day of May" should read "On the 14th day of May."

In the 14th line from the top of page 7 of said abstract the words "share of holders" are incorrect and should read "share holders," the work "of" having been inserted by appellants by mistake.

Appellees amend line 1 at the top of page 9 of said abstract by striking out the word "at" and inserting in lieu thereof "before noon of the second day" so that it will read "That before noon of the second day of the August term etc."

In the 5th line from the bottom of page 12 of said abstract appellees insert after the word and figures "of 1906" the following testimony of Geo. Case which has been omitted from the abstract.

Q. And in assessing the First National Bank did Mr. Kirby hand you a piece of paper showing the condition of the bank?

A. It was handed into the City Council.

Q. Did he hand you in one or show you one?

A. A list of the stockholders.

Q. Did he show you a statement of the resources of the bank?

A. Yes sir, later.

In the 5th line from the top of page 13 of said abstract appellees insert after the word "roll," the following testimony which was omitted by appellants from their abstract.

69 In the case of the Estherville State Bank and the Iowa Savings Bank—I can't be sure whether they were put down from questions asked or whether they handed me a sheet of some kind.

Before the first word, "to" in the first line of page 16 of said abstract should be inserted the words "To which question and."

The last word of the 13th and the first word of the 12th lines from the bottom of page 16 of said abstract should read "page 6" instead of "page 60."

Between the 8th and 9th lines of page 17 the following testimony of Geo. Case on cross examination which was omitted from the abstract should be inserted, "I made a temporary assessment prior to that time and it was changed by the city council."

Just before the words "A. We put in $15,000 etc" in the 13th line of page 22 should be inserted the following objection which was made upon the trial of the cause after the question was asked and before answer made but has been omitted by appellants, "Objected to as incompetent, irrelevant and immaterial."

Between the 15th and 16th lines from the bottom of page 22 should be inserted the words, "Same objections."

Between the 6th and 7th lines from the bottom of page 22 should be inserted the words "Same objections."

The words, "A. To the best of our judgment, yes sir" in the 12th line from the bottom of page 26 of said abstract are not the answer to the preceding question. The following is the answer that was given on the trial of the case, "We attempted to place them at what we thought the shares were worth and would bring at any time in

the market. Then followed this question "Q. State whether or not that is what you did," to which the answer given is the one
70 in the 12th line from bottom of page 22 or "To the best of our judgment, yes sir."

On the 30th page of said abstract in the 9th line thereof after the words "year ago," should be inserted the following which was given on the trial of the case and has been omitted from the abstract, namely, "It may be a little later."

BRYON M. COON,
MYERLY & DAVIDSON,
Attorneys for Appellees.

We, Byron M. Coon and Myerly & Davidson, attorneys for the appellees herein certify that the foregoing additional and amended abstract so far as it purports to set out the record in the above entitled cause and the evidence offered therein and the proceedings is a true and correct abstract of the portions of the record and evidence and proceedings set out.

BYRON M. COON,
MYERLY & DAVIDSON.

Endorsed on cover: File No. 20,996. Iowa supreme court. Term No. 262. The First National Bank of Estherville, Iowa, E. B. Soper, C. J. Ives *et al.*, plaintiffs in error, *vs.* The City Council of Estherville, sitting as a Board of Equalization and Review *et al.* Filed January 30th, 1908. File No. 20,996.

Office Supreme Court, U
FILED.
DEC 10 1909
JAMES H. McKENN

APPENDIX TO ARGUMENT OF PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 64.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, et al.,

Plaintiffs in Error,

vs.

THE CITY COUNCIL OF ESTHERVILLE, SITTING AS A BOARD OF EQUALIZATION AND REVIEW, et al.

In Error to the Supreme Court of the State of Iowa.

STIPULATION TO CORRECT RECORD.

IT IS HEREBY STIPULATED, ADMITTED AND AGREED as a fact by the parties in the above entitled suit that the certificate of H. L. Bosquet, Clerk of the Supreme Court of Iowa, as it appears on page 15 of the printed record in said cause, should follow page 44 of said printed record of the original transcript on file in this court, and the same is to be taken in all respects as though attached to and following said printed record and original transcript as above agreed and provided for.

Dated November , 1909.

BYRON M. COON,
Attorney for Defendants in Error, and Defendants in the Court below.

CHAS. A. CLARK,
Attorney for Plaintiffs in Error, and Plaintiffs in the Court below.

/3

Supreme Court, U. S.
FILED.
DEC 1 1909
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1909.

No. 64.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, et al.,

Plaintiffs in Error,

vs.

THE CITY COUNCIL OF ESTHERVILLE, SITTING AS A BOARD OF EQUALIZATION AND REVIEW, et al.

In Error to the Supreme Court of the State of Iowa.

BRIEF FOR PLAINTIFFS IN ERROR

BY

CHARLES A. CLARK.

Hallmann Bros., Law Printers, 624 Dearborn St., Chicago.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 64.

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, et al.,

Plaintiffs in Error,

vs.

THE CITY COUNCIL OF ESTHERVILLE, SITTING AS A BOARD OF EQUALIZATION AND REVIEW, et al.

In Error to the Supreme Court of the State of Iowa.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The plaintiffs in error are shareholders in the First National Bank of Estherville, Iowa. Their respective shares were valued and assessed for taxation for the year 1906 by the assessor of the City of Estherville (Record 19, par. 3). (Admitted by defendants' answer, Record 21, par. 4.)

This assessment having been returned to the city council of Estherville, that council, thereafter sitting as a board of equalization and review, increased such assessment to $130 per share, and gave notice thereof to plaintiffs in error, fixing a day for further hearing and final action (Record 19, par. 3). (Admitted by defendants' answer, Record, 21, par. 4.)

At such hearing before the Board of Review, plaintiffs in error appeared by their attorney "and objected to such action of said board, and to the valuation fixed by them, as being in excess of the actual value of said stock, and exorbitant and unjust, and argued, and endeavored to convince the Board, that the taxable value of the shares of said stock in said First National Bank should be no greater sum, or more than the stockholders would receive if the bank was liquidated and its assets were converted into money, by the collection of its bills receivable and other assets and payment made of its liabilities, and that the proper, just and legal assessed valuation of its capital stock is to be found by adding together the capital, surplus, and undivided profits of said First National Bank, and from the sum thereof subtracting the amount of the bank's capital invested in real estate and dividing the remainder by the number of its shares of capital stock, and that such quotient would be the true assessable value of each share of stock; and that such assessed valuation of the stock of the First National Bank of Estherville could not be justly and legally fixed at a sum in excess of $112 per share" (Record 19, par. 4). (Admitted by defendants' answer, Record 19, par. 5.) It is there "alleged, by defendants in error, that the taxable value of the shares is what their market and actual value was on the 1st day of January, 1906." Thereupon the board assessed the shares at $130 each (Record 19, bottom; 20, top). Admitted. (Record 21, par. 4.) From this action of the board of equalization plaintiffs in error appealed to the District Court of Iowa for the county wherein Estherville is located (Record 16-17). There plaintiffs in error, as appellants, and in accordance with the statutes of Iowa, filed their petition in equity (Record 17-20), setting up the objections urged by them before the Board of Review and further charging that "the said stock is not assessed and valued in proportion to other like personal property in the City of Estherville, but is grossly in excess thereof

and unfair to these appellants, and is unequal taxation" (Record 22).

The petition shows that the cashier of the said Bank furnished the assessor with the following statemnet of its resources and liabilities:

"RESOURCES OF FIRST NATIONAL BANK OF ESTHERVILLE, ON JANUARY 1ST, 1906.

Cash due from banks	$ 13754.30
Bills receivable owned by the bank	396198.05
U. S. Bonds to secure circulation	25000.00
Redemption fund with U. S. Treasurer	1250.00
Bank building owned by bank in which its business is conducted	12500.00
Overdrafts to sundry customers	6737.28
Cash on hand in bank	24471.83
Total resources	479911.46

"LIABILITIES OF FIRST NATIONAL BANK OF ESTHERVILLE, ON JANUARY 1ST, 1906.

Capital stock actually paid in	100000.00
Surplus fund	20000.00
Undivided profits	1994.90
Dividends for last quarter 1905, being 2½ per cent. capital stock	2500.00
Circulation outstanding	25000.00
Deposits in bank, subject to check and time certificates	305416.56
Bills payable, for borrowed money	25000.00
Total liabilities	479911.46"

(Record 18.)

This is admitted (Record 21, par. 3.)

On trial of the appeal in the District Court it was shown by the cashier of the Bank that "the statement incorporated in paragraph 2 of appellants' petition contains a true and correct statement of the condition of the First National Bank on the first day of January, 1906" (Record 27). This was in no manner contradicted at the trial.

It was admitted "that the real estate of the First National Bank, being the building and lot on which the Bank business was conducted" was assessed for the year 1906 at $14,000 (Record 27, bottom). At said trial the defendants in error introduced evidence to show that the shares of stock of the Bank had been sold at $175 per share, and that this was considered by the Board in assessing the value of said shares (Record 31 to 33, and 35).

The assessment complained of was confirmed by the District Court. The opinion of that learned court shows that this was done upon the basis of assessing said shares at their actual or market value (Record 36 to 38). In the decree entered by him it was found as follows:

> "5. That Section 1322 of the Code of Iowa, of 1897, provides that 'as an aid' in fixing the value of such shares the corporation shall furnish a statement to the assessor which shall among other things show the capital stock, surplus and undivided earnings, and the assessor upon such statement 'and other information he can obtain' shall fix the value of such stock taking into consideration the capital, surplus and undivided earnings, and after deducting the value of the real estate owned by the bank, thus fix the value of the shares, and that the proper construction of said section of the code would render it competent to be considered in determining the matters in controversy in this action, the evidence produced upon the trial thereof, of the true, or actual, or market value of the said stock. And that the terms 'actual value' and 'market value' are synonymous, and the court further finds that according to the laws of Iowa, all property shall be assessed at its actual value."
>
> "7. *That the actual value of the stock, diminished by the proportionate value of the real estate owned by the bank, furnished the proper sum upon which to assess the tax.*
>
> "8. That on the trial of this cause evidence was produced by appellees to show, and which did show, that the shares of stock in said National Bank were actually worth in the market largely in excess of the valuation fixed by the Board of Equalization and Review, and that the valuations fixed by the said Board should stand in

the absence of evidence on the part of the appellants on the contrary to show that the actual value of the stock was less than that fixed by the Board of Equalization and Review; and that upon this appeal it was incumbent upon the appellants, in view of the evidence produced by the appellees as to the actual value of the stock, to produce evidence to show that the actual value of the stock was less than contended for by appellees which was not done."

. . . . . .

"It is further ordered, adjudged and decreed that the actual market value of the said national bank shares was largely in excess of the valuation fixed by the board of review; namely One Hundred Thirty Dollars per share, and that the valuation fixed by the board of review should stand, and the said shares of stock of the said First National Bank of Estherville shall be entered for taxation at a valuation of $130.00 per share as determined by the said city council. That the costs of this action be taxed to the appellants.

"To all of which the appellants except and object.

"A. D. Bailie,

"Judge of the 14th Judicial District, Iowa."

(Record 39-40.)

Appeal to Supreme Court of Iowa.

From this decree plaintiffs in error appealed to the Supreme Court of Iowa. The case was there triable *de novo* in equity under Section 1373 of the Code of Iowa. (See opinion, Record 9.)

The Supreme Court affirmed the decree of the court below upon the express ground *that the shares of stock were, under the statutes of Iowa, required to be assessed and taxed at their actual selling or cash value* (Record 8 to 11).

The court refused to consider the contention of plaintiffs in error that "through the action of the defendant board as complained of, there was worked a violation of Section 5219 U. S. Revised Statutes, having to do with the subject of state taxation of national bank shares," upon the ground

that "such matter was not presented to the board, or suggested on the trial in the court below" (Record 7).

It will be observed that the learned court did not deny that the pleadings fairly and distinctly raised the issue under said Section 5219.

To review this decision of the Supreme Court of Iowa this writ of error was sued out.

Assignment of Errors.

Plaintiffs in error say that there is manifest error on the face of the record in this:

1. The Supreme Court of Iowa erred in sustaining the validity of the statutes of Iowa providing for the taxation of shares of stock in National Banks.

2. The said court erred in refusing to pass upon the validity of the statutes of Iowa for the taxation of shares of stock in National Banks as being in violation of and in conflict with Section 5219 of United States Revised Statutes (Record 7).

3. The said court erred in sustaining the validity of said statutes of Iowa in the face of the objection of plaintiffs in error, appearing of record that their shares of stock, under said statutes, were "not assessed and valued in proportion to other like personal property in the city of Estherville, but is grossly in excess thereof, and unfair to these appellants" (Record 22, Amend. to Petition).

4. The said court erred in sustaining the validity of said statutes of Iowa against the contention and claim of plaintiffs in error appearing of record. that the good will and dividend-earning power of said Bank, the ability with which its corporate affairs were managed, could not be taken as elements of value in the valuation and assessment of their shares of stock for taxation (Record 20).

5. The said court erred in sustaining the validity of said statutes of Iowa against the contention and claim of plaint-

iffs in error appearing of record that they could not be lawfully taxed in excess of the asset value of their shares of stock as in the case of other moneyed institutions of Iowa, and that taxation on the market value of their shares was exorbitant and unjust (Record 19).

6. The said court erred in deciding the cause wholly under the statutes of Iowa, and ignoring and refusing to consider the claims and contentions of plaintiffs in error that such statutes could not warrant taxation of their shares so far as in conflict with Section 5219 of the United States Revised Statutes.

7. The said court erred in holding that the market or selling value was a lawful basis for determining the valuation and assessment for taxation of the shares of stock of plaintiffs in error, and erred in not holding such basis to be wholly illegal and void under the restrictions of Section 5219 of the United States Revised Statutes (Record 9).

8. The said court erred in sustaining an assessment and valuation of the shares of stock of plaintiffs in error based upon the market or selling value of said shares (Record 9 to 11).

9. The said court erred in sustaining an assessment against the shares of stock of plaintiffs in error in excess of the value of the assets other than real estate of the First National Bank of Estherville, Iowa, less $25,000 of United States bonds held by said Bank, and $1250 U. S. notes held as redemption fund.

10. The said court erred in sustaining the statutes of Iowa authorizing an assessment for taxation against the shares of stock of plaintiffs in error in said Bank, in excess of other like personal property, and in excess of, and at a greater rate than authorized by the statutes of Iowa upon other moneyed capital in the hands of individual citizens of said state; and in excess of and at a greater rate than upon the shares of stock and property held by the individual citizens of said

state in state and private banks, and other like banking institutions.

11. The court erred in sustaining any assessment of the shares of stock of plaintiffs in error for taxation forasmuch as the statutes of Iowa providing for the taxation thereof are wholly void, unauthorized by, and in conflict with, Section 5219 of the Revised Statutes of the United States.

STATUTES OF IOWA BEARING UPON THE QUESTIONS INVOLVED.

Code of Iowa.

"SEC. 1305. VALUATION. All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item. . . . Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade."

"SEC. 1321. PRIVATE BANKERS. Private banks or bankers, or any other persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liability of such bank or banker on January first of the current year, as follows:

"1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers of other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

"2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

"3. The amount of all deposits made with them by others, and also the amount of bills payable;

"4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

"5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

"The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and of debts owing by such bank as provided in this chapter, and the aggregate actual value of bonds and stocks, after deducting the portion thereof exempt, or otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by Sec. 1305, not including real estate, which shall be listed and assessed as other real estate." (As amended by the laws of 1898, page 24.)

"SEC. 1322. NATIONAL, STATE AND SAVINGS BANKS. Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate, owned by them, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed."

"SEC. 1324. VALUATION OF CORPORATION STOCK. If the assessor is not satisfied with the appraisement and valuation furnished as provided in the preceding sections, he may make a valuation of the shares of stock based upon the facts contained in the statements above required, or upon any information within his possession, or that shall come to him, and shall, in either case, assess to the owners the stock at the valuation made by him. If the officers of any corporation refuse or neglect to make the statement required, the as-

sessor shall make a valuation of the capital stock of the defaulting corporation from the best information obtainable. In deducting, under the provisions of this chapter, the value of real estate from the actual value of the properties, shares or capital stock of any person, firm, association or corporation, the actual value at which said real estate is valued by the assessor or other taxing officer or body where the same is assessed shall be the value thereof."

"SEC. 1325 CORPORATION LIABLE. The corporations described in the preceding sections shall be liable for the payment of the taxes to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed to the stockholder at his post-office address, as the same appears upon the books of the company, or is known by its secretary."

"SEC. 1327. REAL ESTATE OF CORPORATIONS. All real estate owned by corporations, returned in their statements as part of their assets for purposes of taxation, shall be valued therein for such assessment as other real estate, except as otherwise provided, and shall not be otherwise assessed."

"SEC. 1373. COMPLAINT TO BOARD OF REVIEW.—APPEAL. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the

county in which such board holds its sessions, within twenty days after its adjournment. Such appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which shall relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly."

"SEC. 1850. IVESTMENT OF FUNDS. Each savings bank shall invest its funds or capital, all moneys deposited therein and all its gains and profits, only as follows: . . .

"5. It may discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security, but shall not purchase, hold or make loans upon the shares of its capital stock. . . .

"SEC. 1860. RESERVE. Savings banks doing a commercial business, located in towns having a population of less than three thousand inhabitants, shall at all times keep a cash reserve fund equal to fifteen per cent. of their commercial deposits, and eight per cent. of their savings deposits, and all such banks located in cities and towns having a population of three thousand or over shall at all times keep a cash reserve fund equal to twenty per cent. of their commercial deposits, and eight per cent. of their savings deposits. Savings banks doing an exclusive savings bank business shall at all times keep a cash fund equal to eight per cent. of their deposits. Three-fifths of such reserve fund provided for in this section may be kept on deposits, subject to call, with other banks organized under state or national laws.

"SEC. 1872. QUARTERLY STATEMENTS. All savings and state banks shall make full, clear and accurate statement of the condition of the bank, verified by the oath of the president, vice-president, cashier, or assistant cashier, and attested by the signatures of at least three of the directors, or verified by the oath of two of its officers and attested by two of the directors, which statement shall contain:

"1. The amount of capital actually paid in;

"2. The amount of debts of every kind due to banks, bankers, or persons other than regular depositors;

"3. The amount due depositors, including sight and time deposits;

"4. The amount subject to be drawn at sight then re-

maining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such bank;

"5. The amount of gold and silver coin and bullion belonging to such bank at the time of making such statement;

"6. The amount then on hand of legal tender and national bank notes and subsidiary coin;

"7. The amount of drafts and checks on other solvent banks, and other cash items not dishonored, then on hand and belonging to such bank;

"8. The amount of bills, bonds, and other evidence of debt discounted or purchased by such bank, and then belonging to the same;

"9. The value of real or personal property owned by such bank, specifying the amount of each;

"10. The amount of individual profits, if any, then on hand;

"11. The total amount of liabilities to such association on the part of the directors thereof.

"Which statement shall be transmitted to the auditor of state within ten days after the receipt of a request or requisition therefor from him, and by him filed in his office."

"SEC. 1889. STATEMENT—DOING BUSINESS—LOAN AND TRUST COMPANIES. . . . No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits and issue drafts on their depositaries, but such companies shall be subject to examination, regulation and control by the auditor of state, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section eighteen hundred and eighty-two of this chapter for stockholders in savings and state banks. . . .

"SEC. 3632. JUDICIAL NOTICE. Matters of which judicial notice is taken need not be stated in a pleading."

"SEC. 3639. AMOUNT OF PROOF. A party shall not be compelled to prove more than is necessary to entitle him to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain his defense."

"SEC. 4100. APPELLATE JURISDICTION OVER JUDGMENTS. The Supreme Court has appellate jurisdiction over all judg-

ments and decisions of all courts of record, except as otherwise provided by law."

"SEC. 4136. ASSIGNMENT OF ERRORS. Except in actions triable *de novo*, no action shall be considered by the Supreme Court unless pointed out by an assignment of error. . . ."

United States Statutes.

"SEC. 5219. STATE TAXATION. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Act of June 3, 1864.

"That the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act shall not exceed the rate upon the shares in any of the banks organized under the authority of the state where such association is located."

POINTS OF LAW AND FACT.

I.

JURISDICTION.

1. The Statutes of Iowa printed *supra* show that different methods are provided for the taxation of moneyed capital invested in national banks, and in state banks, and like institutions.

a. As to state banks the taxation provided by Section 1322, Code of Iowa, is not upon the shares, but upon the assets of the banks from which U. S. bonds held by them must be deducted.

Home Savings Bank v. *Des Moines*, 205 U. S., 503.

b. The tax upon private banks and bankers under Section 1321, Code of Iowa, is merely upon the balance of moneys and credits, the value of stocks and bonds owned by them "after deducting the portion thereof exempt,"—certainly U. S. bonds are deducted,—and the value of "other property pertaining to the business," not including real estate. This last would cover office furniture, and ordinarily a gilt sign.

c. National bank shares are required to be taxed at their "actual or selling value" by sections 1305 and 1322, Code of Iowa. This is the true construction of these sections as determined by the Supreme Court of Iowa in instant case. (Record 8 to 11.)

It results that in the taxation of national banks shares the franchises, good will, good business management, dividend earning power, and United States bonds held as required by law are all included by force of the very statutes themselves, while all of these elements are excluded by force of the same statutes, as to moneyed capital in the hands of individual citizens and invested in the very moneyed institutions which come in competition with national banks.

2. This discrimination against national banks is clearly

not warranted but forbidden by Section 5219, United States Revised Statutes, and renders the Iowa system of taxing national banks utterly null and void.

San Francisco Natl. Bank v. *Dodge*, 197 U. S., 70.
Van Allen v. *Assessors*, 3 Wall., 581.
Bradley v. *The People*, 4 Wall., 462.
People v. *Commissioners*, 94 U. S., 418.
People v. *Weaver*, 100 U. S., 543.
Mercantile Bank v. *New York*, 121 U. S., 145-152.
Owensboro Nat. Bank v. *Owensboro*, 173 U. S., 679-683.
Hubbard v. *Board*, 23 Iowa, 145.

3. There is no power to tax the shares of national banks except as allowed by Act of Congress, now section 5219, United States Revised Statutes.

Home Savings Bank v. *Des Moines*, 205 U. S., 516.
Owensboro Nat. Bank v. *Owensboro*, 173 U. S., 668.
People v. *Weaver*, 100 U. S., 539-543.
Weston v. *Charleston*, 2 Pet., 449.
Osbun v. *Bank*, 9 Wheat., 738.
McCullough v. *Maryland*, 4 Wheat., 316.
Bank of Albia v. *City Council*, 86 Iowa, 36-7.

4. The assessor, the board of equalization, and the courts of Iowa, are no less bound to keep within the sole warrant of authority for taxing national bank shares than the legislature itself.

The objections of plaintiffs in error before the board that the proposed taxation was "exorbitant and unjust," and that the valuation of shares could not exceed the value of assets, as in the case of state banks, moneyed institutions and private banks and bankers, raised, *ex vi termini*, questions as to the validity of the Iowa statutes under Section 5219 of United States Revised Statutes. (Record 19, par. 4.)

So of their objection that "said stock is not assessed and

valued in proportion to other like personal property in the city of Estherville, but is grossly in excess thereof, and unfair to these appellants, and is unequal taxation." (Record 22, Amendment to Petition.)

These objections were all urged before the District and Supreme Courts.

The courts were bound to take judicial notice of the statutes, Federal and State, authorizing the taxation complained of.

> "Matters of which judicial notice is taken need not be stated in a pleading." (Code of Iowa, Sec. 3632.)

5. The Supreme Court of Iowa knew perfectly well that the system of taxation of which plaintiffs in error complained was wholly void under Section 5219, United States Revised Statutes. It had so decided itself in *Hubbard* v. *Board*, 23 Iowa, 145.

The case of *Bank* v. *Dodge*, 197 U. S., 70, which is cited and quoted from in its opinion to sustain the most oppressive valuation which could be put upon the shares of plaintiffs in error, held a scheme of taxation of shares of national banks in California, which was precisely similar to the Iowa scheme of taxation, to be in conflict with said Section 5219 and absolutely null and void.

The learned court seems to have cited this decision, and to have quoted from it, for the purpose of making the Iowa system as much in conflict with Section 5219 as possible, and then to have trampled upon the portion of the decision which invalidated the very system which it upheld.

Then it declared that Section 5219 was not drawn in question, and that it would not pass upon the effect of that section.

The settled doctrine of that court is:

> "As the case is triable here *de novo*, we understand that all questions may be presented in this court which legitimately arise on the record, whether the same were urged or relied on in argument in the District Court or not.

"We cannot rely on the assertions of counsel in this respect, but must look alone to the record, and, if a question now urged is made therein, or fairly arises because of the allegations contained in the pleadings, then the conclusive presumption must be indulged that such question was before the court, although it may not have been specially relied on in argument."

Seymour v. *Shea*, 62 Iowa, 711.

Kaufman, v. *Dostal*, 73 Iowa, 392-3.

Smith v. *Knight*, 88 Iowa, 280.

Johnston v. *Johnston*, 138 Iowa, 500.

Hackworth v. *Zollars*, 30 Iowa, 436.

Sherwood v. *Sherwood*, 44 Iowa, 192.

Where it was claimed that objection should have been made before the assessing officer, that court said:

"The treasurer, when acting with reference to the assessment of property, is not a judicial officer, and the ordinary rules of pleading and evidence applicable to the trial of a case in court need not, and, indeed, could not be followed in the proceeding before him. *The plaintiff was entitled on his appeal to have determined every question which the treasurer was called upon to determine with reference to the liability of the plaintiff to assessment on moneys and credits for the years specified. Burns* v. *McNally*, 90 Iowa, 436.

"The issue before the District Court on such appeal is as to the correctness of the action of the assessing officer or tribunal, and the evidence must be confined to that question. But when the evidence is submitted it is for the court to determine on the whole evidence whether the officer or tribunal has acted properly, and if, as to any items included by the assessment officer or tribunal, it appears that the taxpayer was not liable to assessment, then the District Court should reduce the assessment accordingly; and if it finds that under the evidence no assessment should have been made, it should set aside *in toto* the assessment complained of."

Schoonover v. *Petcina*, 126 Iowa, 265-6.

That, however, was not a case of assessing shares of stock in a national bank.

6. "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

Rogers v. *Alabama*, 192 U. S., 230.

Smithsonian Institution v. *St. John*, 214 U. S., 279.

The same rule applies to rights arising under statutes of the United States enacted to protect constitutional rights as in the present instance.

Chapman v. *Goodnow*, 123 U. S., 540-548.

Navigation Co. v. *Homestead Co.*, 123 U. S., 552.

McCullough v. *Virginia*, 172 U. S., 117.

M. K. & T. Ry. Co. v. *Elliott*, 184 U. S., 530-534.

Arrowsmith v. *Harmoning*, 118 U. S., 194.

Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574.

People v. *Hoffman*, 7 Wall., 16.

Williams v. *Weaver*, 100 U. S., 547.

Waite v. *Dowley*, 94 U. S., 527.

Swope v. *Leffingwell*, 105 U. S., 3.

The jurisdiction cannot be defeated by showing that the record does not in direct terms refer to statutory or constitutional provision, nor expressly state that a federal question was presented. The true jurisdictional test is whether it appears that such a question was decided adversely to the federal right claimed.

Murray v. *Charleston*, 96 U. S., 432-441.

Crowell v. *Randall*, 10 Pet., 368.

Eureka Co. v. *Yuba County Court*, 116 U. S., 410.

7. It will be observed that the contention of plaintiffs in error arises under the second clause of Section 709, U. S. Revised Statutes, and hence need not be set up and claimed with the particularity required under the third clause of that section. This is in accordance with repeated decisions of this court.

"Under this section there are three classes of cases

in which the final decree of a state court may be re-examined here:

"(1) 'Where is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity;'

"(2) 'Where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;' . . .

"But where . . . the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. *Miller* v. *Nicholls*, 4 Wheat., 311; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Satterlee* v. *Matthewson*, 2 Pet. 380, 410; *Fisher's Lessee* v. *Cockerell*, 5 Pet. 248; *Crowell* v. *Randell*, 10 Pet. 368; *Harris* v. *Dennie*, 3 Pet. 292; *Farney* v. *Towle*, 1 Black 350; *Hoyt* v. *Shelden*, 1 Black, 518; *Railroad Co.* v. *Rock*, 4 Wall., 177; *Furman* v. *Nicol*, 8 Wall. 44; *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U. S. 254."

Water Power Co. v. *Street Ry. Co.*, 172 U. S., 487-8.

The authorities there cited are clear and decisive upon this question.

If a federal question is shown by the record, under the second clause of Section 709, this court has jurisdiction although the state court may have evaded a decision of such question.

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the mean-

ing of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chapman v. *Goodnow*, 123 U. S., 548.

So where the federal question arises upon the record, this court has jurisdiction to review, although the state court evades a decision of that question upon the ground that it was not argued either orally or in print as its decisions required, in order to have the federal question there passed upon.

Des Moines Nat. Co. v. *Iowa Homestead Co.*, 123 U. S., 554-5.

Deposit Bank v. *Frankfort*, 191 U. S., 518-19.

II.

IOWA SCHEME FOR TAXATION OF NATIONAL BANKS NULL AND VOID UPON ITS FACE.

This scheme, in brief, taxes state banks, private banks, and other moneyed institutions for the value of their assets only.

Home Savings Bank v. *City of Des Moines*, 205 U. S., 503.

From these assets United States bonds must be deducted. (Ib.) The shareholders of national banks are taxed upon the market value of their shares which includes United States bonds held by the banks, value of franchise, good will, dividend earning power, and sound business management.

See opinion in instant case, Record 6 to 11, reported, 136 Iowa, 203.

San Francisco Nat. Bank v. *Dodge*, 197 U. S., 80-81.

That such system of taxation of national banks by the states is utterly null and void has been held by this court from the first and is still so held. See decisions cited *supra*, under division "I" of this brief, points 2 and 3.

The learned District Court understood perfectly well that

this was the issue involved, and by its decree found as follows:

> "7. That the actual value of the stock, diminished by the proven value of the real estate owned by the bank, furnished the proper sum upon which to assess the tax." (Record 39.)

And by this decree adjudged that

> "the said shares of stock of the First National Bank of Estherville, shall be entered for taxation at the valuation of $130 per share as determined by the city council." (Record 40.)

This decree was affirmed by the Supreme Court of Iowa, and thus an illegal and void system of taxation of the shares of plaintiffs in error was upheld.

III.

MEASURE OF RELIEF.

Under their general prayer for relief, plaintiffs in error are entitled to have the illegal assessments wholly annulled and set aside.

Otero v. *Scalzo*, 13 U. S., 684.

Tyler v. *Savage*, 143 U. S., 79.

Jones v. *Van Doren*, 130 U. S., 684.

Iowa decisions are to same effect.

Pond v. *Waterloo &c. Works*, 50 Iowa, 596.

Haskins v. *Rowe*, 61 Iowa, 180.

Laverty v. *Sexton*, 41, Iowa, 435.

Herring v. *Neely*, 43 Iowa, 157.

Hail v. *Ensign*, 61 Iowa, 724.

ARGUMENT.

I.

JURISDICTION.

As to the jurisdiction of this court not much need be said in addition to what is urged in division "I" of "Points of Law and Fact," *supra*.

The excuse of the learned Supreme Court of Iowa for refusing to decide the federal question is not sustained by its own decisions which it cites in apology therefor.

Railway Company v. *Cedar Rapids*, 106 Iowa, 476; was where the city, on the appeal of the Railway Company, claimed that the court below, and this court should have included in the assessment certain property lying outside of the city limits which the assessor refused to include at all. This court simply refused to make a new assessment covering such property in a case where the *city* did not raise the question by appeal.

Farmers L. & T. Co. v. *Fonda*, 114 Iowa, 728; the like question was involved. It was there claimed for the city that, on the appeal of the Trust Company this assessment should have been increased. This court said, "It was well settled under the statutory provisions in force prior to the present Code that on such an appeal the court did not increase the assessment of the complaining tax-payer." And the court refused to make such increase under the present Code against the complainant tax-payer, where the city took no appeal. Nothing more is decided by either of these cases.

The learned counsel for defendants in error, on pages 29 and 30 of his brief in support of motion to dismiss, cites numerous decisions of the Supreme Court of Iowa in excuse of the action of that learned court in evading the federal question and refusing to decide it. It is sufficient to say that all of these cases are decisions in actions at law, triable on errors excepted to in the court below, and on assignment of

errors in the Supreme Court. They are, moreover, cases where matters which did not appear of record in the court below were sought to be made grounds of errors assigned in the Supreme Court.

In the two decisions in equity suits cited on page 30, being

Zion Church v. *Parker*, 114 Iowa, 6,

Manfg. Co. v. *Hasbrock*, 68 Iowa, 554,

the new matter relied on was wholly omitted from the pleadings in the lower courts, and it goes without saying could not be made ground for reversal in the Appellate Court.

In the instant case, the federal questions, the decision of which the learned Supreme Court of Iowa evaded, clearly appeared in the pleadings. They were on the face of the record brought up from the lower court; and even the local practice, under the decisions of that Honorable Court, required it to deal with questions appearing upon the face of the record, "or fairly arising because of the allegations contained in the pleadings."

Seymour v. *Shea*, 62 Iowa, 711.

And see Iowa decisions cited *supra*, point 4, division I of brief.

As held by that learned tribunal itself, ordinary rules of pleading do not apply to appeals of this character:

> "The issue before the District Court on such appeal is as to the correctness of the action of the assessing officer or tribunal, and the evidence must be confined to that question. But when the evidence is submitted it is for the court to determine on the whole evidence whether the officer or tribunal has acted properly, and if, as to any items included by the assessment officer or tribunal, it appears that the taxpayer was not liable to assessment, then the District Court should reduce the assessment accordingly; and if it finds that under the evidence no assessment should have been made, it should set aside *in toto* the assessment complained of."
>
> *Schoonover* v. *Petcina*, 126 Iowa, 265-6.

Under its own usages, practice and decisions, that learned

court should have decided the federal questions clearly appearing upon the face of the record brought up on appeal instead of evading the decision of such questions.

But it is respectfully submitted that where national bank shares are taxed under statutes which are wholly invalid and void, as in the instant case, and the taxpayer has interposed timely objections to such taxation, a federal question is presented and should be determined by this court wholly regardless of any local usage, custom or decision relied upon by the state courts in evading a direct decision as to the validity of such statutes.

It is enough that the validity of such void statute is sustained by refusing to decide either for or against it, and the property of the taxpayer is thus about to be taken by operation of the void laws complained of.

Water Power Co. v. *Street Ry. Co.*, 172 U. S., 487-8, and cases there cited.

Chapman v. *Goodnow*, 123 U. S., 548.

Des Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S., 554-5.

Deposit Bank v. *Frankfort*, 191 U. S., 518-19.

And bearing somewhat upon these questions are,

Raymond v. *Chicago Traction Co.*, 207 U. S., 20.

Central of Georgia Ry. v. *Wright*, 207 U. S., 616.

In the case last above cited the former decisions of this court are reiterated to the effect that notice to the taxpayer is a jurisdictional step requisite to the assessment of property omitted from taxation, and that in the absence of notice the taxing officers acted without jurisdiction and a federal question thereupon arises as to taking his property without due process of law.

So here a valid law is requisite to the taxation of national bank shares. Without such law there is no jurisdiction in the state officers to assess or tax such shares. There was and is no such law in Iowa. The question is jurisdictional and,

like any other jurisdictional question, may be raised at any stage of the proceedings. When the Supreme Court of Iowa sustains the taxation of the shares of stock of plaintiffs in error against their objections to the proceedings under the Iowa statute as being in conflict with Section 5219 of the United States Revised Statutes, it maintains jurisdiction to tax such shares where the Iowa authorities were wholly without power or authority, and without such jurisdiction, and thus affirms and maintains the validity of the void laws of Iowa which it in terms refused to pass upon and decide.

Thus, clearly, it maintained the validity of the void statutes of Iowa and of the authority exercised by the state, both of which were drawn in question as repugnant to the laws of the United States permitting the taxation of national bank shares, solely and only on the terms therein prescribed. Having thus maintained the validity of these void taxing laws of Iowa by decreeing their enforcement, a federal question is presented for review and determination in this court, no matter by what evasion and legerdemain it may be sought to deprive plaintiffs in error of their clear and manifest rights under Section 5219, as against state laws utterly repugnant thereto.

The Supreme Court of Iowa well knew and understood that these state laws were wholly void and nugatory and conferred no jurisdiction or power upon the taxing officers or other tribunals of the state to tax national bank shares; for the case of *San Francisco Natl. Bank* v. *Dodge*, 197 U. S., 70, which is cited, quoted from, and relied upon, to put the most extortionate valuation upon such national bank shares, as compared with moneyed capital in the hands of individual citizens, held a like system of taxation of national bank shares in California to be in conflict with Section 5219, and utterly null and void. The judicial ingenuity and inventive genius which can thus nullify and abrogate the binding force and effect upon purely federal questions of a decision of this

tribunal, which it exultingly quotes, while it nullifies and abrogates it, may excite admiration for a daring judicial exploit of skating on thin ice, or no ice at all, but it cannot thus confer jurisdiction and power upon itself or taxing boards under it, where no such jurisdiction or power exists, to tax the shares of plaintiffs in error under void laws, in direct and irreconcilable conflict with Section 5219, which is the sole and only warrant and chart of authority for such taxation.

II.

INVALIDITY OF IOWA STATUTES.

These statutes provide for assessing and taxing other moneyed institutions and private bankers upon the basis of asset value solely and only. See Sections 1321, 1322, 1324, 1325 and 1327 printed *supra*.

Home Savings Bank v. *Des Moines*, 205 U. S., 503.

From these assets are to be deducted real estate otherwise taxed, and, as held in the Des Moines Savings Bank case, U. S. bonds, and necessarily U. S. legal tender notes. The same statutes including Section 1305, Code of Iowa, printed *supra*, as construed by the Supreme Court of the State in this instant case, require assessment and taxation of national bank shares on the basis of their current or market value, thus including not only United States bonds and legal tender notes held by such banks, but also including the value of franchises, good will, good business management, etc.

All this appears upon the face of the Iowa statutes themselves. No facts need be proven or shown to demonstrate this condition.

From the beginning such a system of taxation of national bank shares has been held to be in conflict with the federal statutes and void.

Van Allen v. *Assessors*, 3 Wall., 581, and authorities cited, *supra*, points 1 and 2, division I of brief.

The Supreme Court of Iowa itself so held under an Iowa scheme of taxation precisely the equivalent of that here and now involved. It decided such scheme to be utterly null and void, and thus abrogated all power to tax national bank shares under then existing laws and said:

> "We, therefore, conclude that, as our legislation now stands, the shares in national banks in this state cannot be taxed. The remedy is with the legislature. . . . If the Act of Congress shall remain unchanged, it will be for the legislative department here to take such action as may be deemed advisable to subject this property to its due proportion of the public burdens."
>
> *Hubbard* v. *Beard*, 23 Iowa, 151-2.

Such is undoubtedly the present situation in Iowa. While no facts are necessary to show the discrimination against national banks and their shareholders, and the consequent invalidity of the scheme, which appears upon its very face, yet the facts in evidence in this case illustrate in a striking manner the force of the objection of plaintiffs in error that "said stock is not assessed and valued in proportion to other like personal property," etc. (Record 22.)

The assets and resources of the First National Bank of Estherville in which plaintiffs in error are shareholders are set forth (Record 22); and this is shown to be the correct and true condition by the bank cashier. (Record 27 to 29.) There is neither conflict nor dispute regarding this. It is admitted that the real estate of the bank was assessed and taxed for that year at $14,000. (Record 27, bottom.) The situation, then, of the bank was this:

Total resources, less outstanding indebtedness		$121,916.56
Deduct real estate	$14,000	
United States bonds	25,000	
United States notes, redemption fund	1,250	
	$40,250	40,250.00
Balance of assets		$81,666.56

Or an asset value of $81.67 per share of stock, assessed and taxed at $130.

This statement of the National Bank shows deposits $305,416.56. (Record 18.)

Now take the case of Rhodes, private banker; his statement shows deposits of $211,856.06 (Record 25); or more than 2/3 the amount of deposits with the National Bank. He was assessed at $10,000 (Ib. bottom), his statement showing a total investment of just that amount in money, credits and bank furniture. (Ib.) There is no showing in the record that this assessment was in any manner changed.

Take the State Bank; it was shown to the assessor to have

Capital	$50,000
Surplus	10,000
Total	$60,000
Deduct debts	20,000
Net amount of money and credits	$40,000

(Record 25).

It was assessed for precisely that amount. In addition to this the statement of its cashier shows that it had in undivided profits $4,125.14. The assessment as above shown was just 80 per cent. of its capital stock.

In the case of the Iowa Savings Bank its statement to the assessor showed

Capital stock	$50,000
Surplus	10,000
Total	$60,000
Deduct amount of notes	15,000
Net amount of money and credits	$45,000

It was assessed for that amount, or 90 per cent. of its capital stock. (Record 24.)

The real condition of this bank on the date of the assessment, as testified to by its cashier, shows a dividend fund on hand of $5,000 and indicates that the bank was doing a commercial business as authorized by the Statutes of Iowa, Sections 1860 and 1872, *supra;* such commercial business is in fact carried on by many savings banks in that state.

It will be observed that the assessments in all of these cases were to the banks themselves as required by law. True, the chairman of the Board of Review testified that the Board assessed the stock of the Iowa Savings Bank at $120 per share and the stock of the State Bank at the same figure. (Record 31.) But if this was done it was a nullity as the law required such assessments to be made to the banks themselves on the basis of assets.

In any view the dicrimination against the national bank whose shares of stock had an asset taxable value, as above shown, of $81.67, per share, as worked out under the state scheme of taxation, was enormous and gross. There can be no claim that the taxes authorized on other banks, moneyed institutions, and moneyed capital in the hands of private citizens, is the fair equivalent of taxes authorized on shares of stock in national banks.

Owensboro Natl. Bank v. *Owensboro*, 173 U. S., 679-683.

The statutes of Iowa themselves do not admit of one tax being the equivalent of the other.

Hubbard v. *Board*, 23 Iowa, 145.

III.

RELIEF TO BE AWARDED.

The plaintiffs in error by their bill of complaint or petition in equity pray for some specific relief, and also for general relief. (Record 20, bottom.) This is, in effect, a prayer in the alternative. The prayer for general relief entitles plain-

tiffs to such relief as they may show themselves entitled to on the face of the bill.

Jones v. *Van Doren*, 130 U. S., 684.

Tyler v. *Savage*, 143 U. S., 79.

If the specific relief prayed for is inappropriate, equity will grant relief under the general prayer.

Oteri v. *Scalzo*, 145 U. S., 589.

The Iowa decisions maintain the same rule.

Pond v. *Waterloo &c. Works*, 50 Iowa, 596.

Haskins v. *Rowe*, 61 Iowa, 180.

Laverty v. *Sexton*, 41 Iowa, 435.

Herring v. *Neely*, 43 Iowa, 157.

Hait v. *Ensign*, 61 Iowa, 724.

It is respectfully submitted that the assessments complained of were wholly illegal and void, and should be abrogated, annulled, and set aside.

CHAS. A. CLARK,
For Plaintiffs in Error.

MOTION TO DISMISS OR TO AFFIRM AND BRIEF AND ARGUMENT IN SUPPORT THEREOF

Supreme Court of the United States

OCTOBER TERM, 1929

No. [illegible]

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, A. E. [illegible], CASHIER, ET AL., Appellants,

vs.

THE CITY COUNCIL OF ESTHERVILLE, IOWA, ET AL., Board of Equalization and Review, etc., Appellees.

IN ERROR TO THE SUPREME COURT OF IOWA.

[illegible]

Attorneys for Defendants in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

No. ~~262~~. 64

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, ET AL., *plaintiffs in Error,*

vs.

THE CITY COUNCIL OF ESTHERVILLE, sitting as a Board of Equalization and Review, et al.

IN ERROR TO THE SUPREME COURT OF IOWA.

MOTION TO DISMISS OR TO AFFIRM.

Comes now the defendant in error, and moves the court to dismiss the writ of error in this case for want of jurisdiction, because there has been no assignment of errors, because there is no Federal question involved giving this court jurisdiction of the case; because there has not been drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and a decision against such a question; because there has not been drawn in question a statute of, or an authority exercised under, a state, upon the ground of repugnancy to the Constitution or a law or treaty of the United States and a decision in favor of the state law or authority in question; because no right has been claimed under the Constitution or a law or treaty

of, or by virtue of a commission held or authority exercised by, the United States; and a decision against the right so claimed. Or, if the writ of error shall not be dismissed, that the judgment of the said Supreme Court of the State of Iowa affirming the decree of the lower court be affirmed on the ground that, although in the opinion of this court the record may show that this court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Counsel for Defendants in error, for the purposes of this motion.

To Chas. A. Clarke, Esq.,

Please take notice, that on the ____ day of _____, A. D., 1909, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon. Annexed hereto is a copy of my brief and argument in support of said motion.

Counsel for Defendants in error, for the purposes of this motion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

No. ~~362.~~ 64

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, ET AL., *plaintiffs in Error,*

vs.

THE CITY COUNCIL OF ESTHERVILLE, sitting as a Board of Equalization and Review, et al.

In Error To The Supreme Court Of The State of Iowa.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR, IN SUPPORT OF MOTION TO DISMISS OR TO AFFIRM.

POINTS OF LAW.

I. FEDERAL QUESTION.

1. On writ of error to a state court the United States Supreme Court can review only decisions of Federal questions, and if no federal question is involved the case is not receivable.

Smith vs. Adsit, 23 Wall., 374.
McCullough vs. Virginia, 172 U. S., 129.
Mo. Pacific Railway Co. vs. Humes, 115 U. S., 520
Doe vs. Eslava, 9 How., 443.
Linton vs. Stanton, 12 How., 425.

Santa Cruz Co. vs. Santa Cruz Ry. Co., 111 U. S. 361.

Christ Church vs. Philadelphia Co., 20 Howard, 26.

2. The construction of state statutes belongs to the state courts, and is not a Federal question, which can be reviewed in this court on writ of error to a state court.

Phoenix Ins. Co. vs. The Treasurer, 11 Wall, 208.

3. There must be a real substantive question on which the case may be made to turn—the mere allegation of a Federal question, if the question in fact does not exist, will not suffice.

Equitable Life Ins. Co. vs Brown, 187 U. S., 311.

St. Joseph, etc. Ry. Co. vs Steele, 167 U. S., 662.

Newberryport Water Co. vs. Newberryport, 193 U. S., 576.

Hamlin vs. Western Land Co., 147 U. S., 532.

Allen vs. Georgia, 166 U. S., 140.

Illinois Cent. Ry. Co. vs. Chicago, 176 U. S., 656.

4. Some question enumerated in the Judiciary Act of 1789, Section 25, must be involved in order to sustain a writ of error from the Supreme Court of the United States to the Supreme Court of a state.

Crawford vs. Branch Bank of Ala., 7 How., 279.

Davis vs. Texas, 139 U. S., 651, 11 Sup. Ct. Rep., 625.

Home Ins. Co. vs. Augusta, 93 U. S., 116.

5. It must appear in direct terms or by necessary intendment that the Federal question was brought to the notice of the state court and decided by it, for it is not sufficient that a Federal question might have been raised, or might have been decided, and was involved in the case.

Crowell vs. Randell, 10 Peter, 368.
Ocean Insurance Co. vs. Palleys, 13 Pet., 157.
Coons vs. Gallagher, 15 Pet., 18.
Mills vs. Brown, 16 Pet., 525.
Endowment & Benev. Asso. vs. Kansas, 120 U. S., 103, 7 S. C. R., 499.
Church vs. Kelsey, 121 U. S., 282, 7 S. C. R. 897.
Clark vs. Penna., 128 U. S., 395, 9 S. C. R., 113.
Gray vs. Coan, 154 U. S., 589, Appx. 14, S. C. R 1168.
Chonteau vs. Gibson, 111 U. S., 200, 4 S. C. R. 340.
Chapin vs. Tye, 179 U. S., 120.
Kipley vs. Illinois, 170 U. S., 186.
Northern Pac. Ry. Co., vs. Austin, 135 U. S. 318.
Marsh vs. Nichols etc. Co., 140 U. S., 354.
Louisville etc. Ry. Co. vs. Schmidt, 177 U. S., 239.

6. Judicial knowledge will not be resorted to to locate the Federal question, nor can jurisdiction be conferred argumentatively from the averments of the pleadings.

Mutual Life Ins. Co. vs. McGrew, ~~188~~ 163 U. S., ~~291~~ 309.
St. Joseph Ry. Co. vs. Steele, 167 U. S., 662.

7. In order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the state could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dis-

missed by this court without considering any Federal question that may have also been presented.

California Powder Works vs. Davis, 151 U. S., 393.

Walter A. Wood Mowing Mach. Co. vs. Skinner, 139 U. S., 295.

Snell vs. Chicago, 152 U. S., 196.

Fowler vs. Lawson, 164 U. S., 255.

Bacon vs. Texas, 163 U. S., 216.

McCullough vs. Virginia, 172 U. S., 128.

New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125 U. S., 38.

O'Neil vs. Vermont, 144 U. S., 368.

Meyer vs. Richmond, 172 U. S., 100.

Crescent Live Stock Co. vs. Butchers' Union Slaughter House Co., 120 U. S., 156.

Costillo vs. McConnico, 168 U. S., 679.

Williams vs. Oliver, 12 How., 124.

Dewey vs. Des Moines, 173 U. S., 199.

Citizens' State Bank vs. Owensboro, 173 U. S., 643.

Kansas Endowment Ass'n. vs. Kansas, 120 U. S., 104.

New York Life Ins. Co. vs. Henderson, 92 U. S., 287.

Grand Gulf Ry. Co. vs. Marshall, 12 How., 167.

Marsh vs. Nichols etc. Co., 140 U. S., 354.

Louisville etc. Ry. Co. vs. Schmidt, 177 U. S., 239.

Fowler vs. Lawson, 164 U. S., 255.

Keokuk Bridge etc. Co. vs. Ill., 175 U. S., 633.

Schuyler Nat. Bank vs. Bollong, 150 U. S., 85, 14 S. C. R., 24.

Erie Railway Co. vs. Purdy, 185 U. S., 148, 22 S. C. R., 605.

Wyley Stave Co vs Butler Co. 166 U.S. 640

8. Although it is true that under the third clause of Section 709 of the Judiciary Act, where a title, right, privilege or immunity is claimed under Federal law, such title, right, privilege or immunity must be especially set up or claimed and that no such provision is made as to cases within the second clause, but it none the less is true that the authority of such statute must "be drawn in question", by some one affected by the decision of a state court in favor of its validity, and that in this particular, the three clauses of the section are practically identical.

Tyler vs. Judges Court of Registration, 179 U. S., 408.

9. The general and invariable rule is that the Federal question must be set up or claimed in the trial court, whenever under the state practice the highest state court in reviewing the judgments of the trial court refuses to consider questions not raised in the trial court of the state.

Baldwin vs. Kansas, 129 U. S., 52.
Brooks vs. Missouri, 124 U. S., 394.
Morrison vs. Watson, 154 U. S., 111.
Erie Ry. Co. vs. Purdy, 185 U. S., 148.
Layton vs. Missouri, 187 U. S., 356.
Spies vs. Illinois, 123 U. S., 131.
Maxwell vs. Newbold, 18 How., 511.
Susquehana Broom Co. vs. West Branch Broom Co., 110 U. S., 57.
The Victory vs. Boylove, 6 Wall, 382.
Schuyler National Bank vs. Bollong, 150 U. S., 85.
Yesler vs. Harber Line Commissioners, 146 U. S., 646.
Carpenter vs. Boyer, 14 Wall, 237.

10. And in the trial court the claim must be more definite than a mere statement that a statute is unconstitutional,

since such a statement may call the attention of the court only to the state constitution.

Endowment and Benefit Asso. vs. Kansas, 120 U. S., 103.

Miller vs. Cornwall R. Co., 168 U. S., 131.

Bolln vs. Nebraska, 176 U. S., 83

Chapin vs Tye, 179 U. S., 127.

Pelton vs. National Bank, 101 U. S., 143.

11. Motion to dismiss will be granted when it appears on the face of the opinion, when it forms a part of the record that the decision of the state court did not involve a federal question, or where the state court may properly have disposed of the case without deciding the federal questions.

Jacks vs. Helena, 115 U. S., 288.

Beaston vs. Farmers' Bank of Dela, 12 Peter, 102.

California ex rel Bryant vs. Holladay, 159 U. S., 416.

France vs. Missouri, 154 U. S., 667 Appx.

Merced Mining Co. vs. Boggs, 3 Wall, 304.

Klinger vs. Missouri, 13 Wall, 257.

Cox vs. Texas, 202 U. S., 446.

UNDER THE IOWA PRACTICE.

12. Questions of whatever nature, not raised in the trial court will not be noticed upon appeal.

Zion Church Company vs. Parker, 114 Iowa, 1.

Petty vs Mutual Fire Ins. Co., 111 Iowa, 359.

Smith vs. McQuiston, 108 Iowa, 52.

Cloud vs. Malvin, 108 Iowa, 363.

Clough vs. Ide, 107 Iowa, 669.

Hinkle vs. Saddler, 97 Iowa, 526.

Ross vs. Hawkeye Insurance Company, 93 Iowa, 222.

Kenosha Stove Co. vs. Shedd, 82 Iowa, 540.
Bolton vs. McShane, 79 Ia., 26.
Garetson vs. Eqi. Life Ass'n., 74 Iowa, 419.
Reynolds vs. Reynolds, 74 Iowa, 89.
Goodnow vs. Plumb, 67 Iowa, 661.
Babcock vs. Board of Equalization, 65 Iowa, 110.
Wilson vs. Palo Alto Co., 65 Iowa, 18.
Wire vs. Foster, 62 Iowa, 114.
Wetmore vs. McMillan, 57 Iowa, 344.
Argall vs. Pugh, 56 Iowa, 308.
Davis vs. Nolan, 49 Iowa, 683.
Trayer vs. Reeder, 45 Iowa, 272.
Stanberry vs. Dickerson, 35 Iowa, 493.
Evans vs. Hawley, 35 Iowa, 83.
McNaughty vs. Chi. & N. W. Ry. Co., 30 Iowa, 336.
Kruck vs. Prine, 22 Iowa, 520.
Starry vs. Starry, 21 Iowa, 254.
Elder vs. Little, 15 Iowa, 65.
Rockwell vs. Kimball, 11 Iowa, 524.
Berry vs. Gravel, 11 Iowa, 135.
Mumma vs. McKee, 10 Iowa, 107.
Hintermister vs. State, 1 Iowa, 101.

13. In the Supreme Court of Iowa a party will be bound by the case made by the pleadings and evidence as exhibited by the record and cannot urge matters which were not presented to the lower court.

Joyce vs. Perry, 111 Iowa, 567.
Dubuque Lumber Co. vs. Kimball, 111 Iowa, 48.
Mason vs. Des Moines, 108 Iowa, 658.
Oliver vs. Depue, 14 Iowa, 490.
Knapp vs. Sioux City & P. Ry. Co., 65 Iowa, 91.

14. Nor can a defense be urged in the higher court that is inconsistent with the plan presented in the lower court.

Ross vs. Hawkeye Ins. Co., 93 Iowa, 222.
Hopper vs. Chicago etc. Ry. Co., 91 Iowa, 639.

15. Nor can he follow out a different theory.
Miner vs. Rhynders, 111 Iowa, 725, 82 N. W., 909.
Dormory vs. Knower, 55 Iowa, 722, 8 N. W., 670.
Laferty vs. Woodward, 16 Iowa, 1.
Garland vs. Wholebeau, 20 Iowa, 271.

16. Neither can he supply matters left out in the lower court by oversight or mistake.
Patterson vs. Stiles, 6 Iowa, 54.
Latterat vs. Coo, 1 Iowa, 1.
Brazelton vs. Jenkins, 1 Morris (Iowa), 15.

17. The foregoing rules apply not only to law cases but to equity cases, triable *de novo*, as well.
Zion Church Co. vs. Parker, 114 Iowa, 6.
Manufacturing Co. vs. Hasbrouck, 68 Iowa, 554.

18. A proceeding of the nature involved in this case is an equity proceeding, triable *de novo*.
Iowa Code, Section 1373.

19. From the foregoing statements of the Iowa practice and law upon the matter of confining the issues to those raised in the lower court, it may be stated that Section 1373 of the Iowa Code does not authorize the Supreme Court of Iowa to perform any other function than that of determining the correctness of the assessment with reference to the complaints made by the appealing tax payer, in the trial court.
Farmers' Loan & Trust Co. vs. Fonda, 114 Iowa, 732.
Railway Co. vs. Cedar Rapids, 106 Iowa, 476.

20. Accordingly, the only issue to be considered in this proceeding is whether appellants' shares of stock were as-

sessed higher than the average of other personal property assessable in the city of Estherville, Iowa—provided there is any question in that case at all that is reviewable by this court.

Article 5, Section 1, Constitution of Iowa.
Code Section 1373.

21. There is no issue suggesting the invalidity of Section 1322 of the Code of Iowa as being in conflict with Section 5219 of the Revised Statutes of the United States, relative to assessment of shares of stock in national banks.

Brown vs. Grand Junction, 75 Iowa, 488.

STATEMENT OF CASE.

This is an appeal under Section 1373 of the Code of Iowa from the action of the members of the city council of the city of Estherville, Iowa, sitting as a board of equalization and review in fixing the assessed value of the shares of stock in the plaintiff bank for the year 1906.

The shares of stock in the plaintiff bank were assessed by the assessor upon a basis of the book or asset value obtained by adding the capital, surplus and undivided profits of the bank, and dividing the sum total by the number of shares of capital stock, to ascertain the value of one share. A proper deduction was made on account of real estate owned by the bank.

The Board of Review and Equalization raised the assessed valuation of the shares of plaintiff stock in said bank after deducting from the assessment of the bank the real estate owned by it to $130 per share.

At the proper time plaintiffs, namely the said bank and its shareholders, appeared before said Board of Review and objected to said action of said Board and to the valuation

fixed by them as being in excess of the actual value of said stock and exorbitant and unjust, and contending that said stock was not assessed and valued in proportion to other like personal property in the city of Estherville, but was grossly in excess thereof, unfair to plaintiffs, and unequal taxation, and contended that the taxable value of the shares of said stock in said bank is to be found by adding the capital, surplus and undivided profits, deducting therefrom the value of real estate owned by the bank, and dividing the remainder by the number of shares of capital stock of said bank.

But said Board of Review declining to give way to the claims of plaintiffs, plaintiffs thereupon in due form, perfected an appeal to the District Court of Emmet County, Iowa. In that court plaintiffs filed a pleading containing a recital of facts and demanding relief, and reiterating the same contention as made below relative to the erroneous assessment and making the same claim as to the proper manner of arriving at the assessable valuation of said shares of stock. An answer was filed in behalf of the board wherein it was denied that the assessment as raised was unjust, and contending that the market value was the proper criterion for valuation, and that the actual and market value of the stock was even greater than that fixed in the raised assessment. It was also denied that the assessment was unfair as related to the assessments on other like property.

Thus far, no question was anywhere raised as to the regularity of the proceedings.

On the trial of the case the following facts were not disputed. The appellant bank is a corporation organized under the National Banking Act of the United States, having a paid up capital stock of $100.000 divided into shares of $100 each. In January, 1906, an officer of the bank furnished to the assessor of the city a statement of the financial condi-

tion of the bank, together with a list of the stockholders. On its face, the statement so furnished disclosed that the resources of the bank,—including real estate valued at $12,500 amounted to $479,911.46, and that this sum was balanced by the aggregate of the liabilities, the latter including the capital stock, a surplus fund of $20,000, undivided profits, $1994.90, and an undistributed quarterly dividend amounting to $2500.

After excluding the value of the real estate owned by the bank, the assessor made assessments against the stockholders on the basis of the par or face value of the stock. The work of the assessor coming on for review before the Board a raise in the assessment to $130 per share was made. It was conceded that the statement furnished the assessor by the bank was correct in its figures according to the books of the bank.

Plaintiff bank then introduced evidence showing that three other banks, one a state bank, one a savings bank, and one a private bank, were doing business in the city. It was made to appear that these banks furnished statements to the assessor and that the assessments made by him were predicated on such statements.

In case of the savings bank it was shown that the bank had $50,000 capital and $10,000 surplus, and that from the aggregate of these was deducted an item of $15,000 designated under the head of liabilities as "amount of notes". In the case of the state bank, the statement showed capital stock of $50,000, surplus $10,000, and from the aggregate of these was deducted an item of $20,000 designated as "total amount of debts". In the case of the private bank the statement showed the bills receivable and money in bank on one side of the account and the bills payable and deposits on the other side. And the value for assessment was arrived at by simply striking a balance.

It will thus be seen that the stocks of the state and savings banks were assessed on a basis of book value. It was also shown that the assessments of the state and savings banks were raised by the board to $120 per share.

Over objection, the board made proof that at or about the time in question several blocks of stock of the appellant bank had changed hands on the basis of $175 per share, cash; that one of the officers of the bank had recently purchased ten shares at that price. And, further that transfers of the savings bank stock had been made at $137 per share.

The District Court sustained the action of the Board of Review whereupon the case was duly appealed to the Supreme Court of Iowa. In the Supreme Court, the contention was brought forward for the first time in argument in that court, that the defendant Board through its action worked a violation of Section 5219 of the United States Revised Statutes, touching upon the state taxation of national banks.

Because of the fact that such matter was not presented to the Board, or suggested on the trial in the court below, the Supreme Court refused to entertain the question pursuant to its repeated decisions bearing upon the subject, and the court held that as a matter of law under the Iowa Statutes shares of stock of national banks were taxable on a basis of the actual and market value, and that in the case in hand, the raise in the assessment as made by the Board was not unwarranted, or contrary to equity, and that the record did not disclose any such discrimination as to warrant interference, and accordingly the decree of the lower court was affirmed, and the assessment as fixed by the reviewing board allowed to stand.

Thereupon the case was taken to this court upon writ of error.

ARGUMENT.

PART ONE.

Federal Question.

I.

Defendants in error take the stand first that this Court will not and cannot properly take jurisdiction of this case because it contains no Federal question to confer jurisdiction upon the court, and that the issues in the case in no way involved the section of the National Banking Act, namely 5219 of the Revised Statutes of the United States. The only question brought before the Board of Review was as to the proper construction of the Iowa Statute relative to taxation of shares of national banks, and the question of fact as to whether or not the assessment upon plaintiff's stock was exorbitant and unjust and out of proportion to the assessments upon other like personal property in the city of Estherville, and discriminative against plaintiff bank and in favor of the other banks.

"On a writ of error to a state court we can review only decisions of federal questions." So stated this court in

Smith vs. Adsit, 23 Wall. 374.

"This court is not entrusted with the duty of supervising all decisions of state courts, to the end that we may see to it that such decisions are never inconsistent, contradictory or conflicting. We supervise these decisions only when a federal question arises."

McCullogh vs. Virginia, 172 U. S. 129.

"Our jurisdiction cannot be invoked unless some right claimed under the constitution, laws or treaties of the United

States is involved. This court is not a harbor where refuge can be found from every act of ill advised and oppressive state legislation" Justice Fields in *Mo. Pacific Railway Co. vs. Humes*, 115 U. S. 520.

"Our jurisdiction to revise such a judgment (of the Supreme Court of a state) is very strictly limited to cases where the same right or title was set up by a party under the general government—the Constitution, treaties, or laws, and was overruled. It is this Federal character of the claim decided against which furnishes some justification for a revision of a state judgment in a federal court, and unless it be clearly of that character, the foundation as well as the policy for our interference entirely fails." Justice Woodbury in *Doe vs. Eslava*, 9 Howard 443.

"We have no jurisdiction over the judgment of a state court upon a writ of error except in the cases specified in that section (the 25th section of the Act of 1780, c. 20). And the jurisdiction of this court is there limited with great care and in plain terms. It gives a writ of error to this court where a party claims a right of exemption under a law of Congress and the decision is against the right claimed." C. Justice Taney in *Linton vs. Stanton*, 12 Howard, 425.

II.

This case arose as a difference of opinion between the plaintiff in error and the defendant board of review as to the proper construction of a state statute. The dispute was over the question as to what was the proper method of arriving at the taxable of plaintiff's bank stock. It is plainly the case of a construction of a state statute, and in its validity or unconstitutionality as being repugnant to Federal laws is not in question in the case as we will show as our argument proceeds. But, if it is purely a question of construction of

a state statute this court clearly cannot and will not take jurisdiction. This court has "repeatedly held that the construction of state statutes belongs to the state courts and is not a federal question which we can review on a writ of error to a state court." Bradley, Justice, in *Phoenix Ins. Co. vs. The Treasurer*, 11 Wallace, 208.

III.

The Federal Question must in fact exist. There must be a real substantive question on which the case may be made to turn. This court has stated that "It is settled that not every mere allegation of a federal question will suffice to give jurisdiction. There must be a real substantive question on which the case may be made to turn, that is a real and not a merely formal federal question is essential to the jurisdiction of this court." White, Justice in *Equitable Life Ins. Co. vs. Brown*, 187 U. S., 311.

IV.

Some question enumerated in the Judiciary Act of 1789 Section 25 must be involved in order to sustain a writ of error from the Supreme Court of the United States to the Supreme Court of a state, for that act is the only foundation for and source of authority by which the United States Supreme Court can review the decision of a state court, and it is only in the cases enumerated in that act that the aggrieved party in the highest court of a state has a right to be heard further by the Supreme Court. *Davis vs. Texas*, 139 U. S., 651; 11 Sup. Court Rep., 675.

V.

It must appear in direct terms or by necessary intendment that the federal question was brought to the notice of

the state court and decided by it, for it is not sufficient that a federal question might have been raised or might have been decided, and was involved in the case, if it was not in fact called to the attention of the trial court in unmistakable terms.

In substantiation of our statement we quote from the many decisions of this court upon that proposition:

"It has been long settled that we have no jurisdiction unless it distinctly appears that a question under the constitution or a law of the United States not only might have been actually raised but was raised and decided." Waite, Chief Justice in *Kansas Endowment Asso. vs. Kansas*, 120 U. S., 104.

"It is well settled that in order to justify a writ of error from this court to review the judgment of a state court, the record must show that the judgment rested upon the disposition of a federal question." Fuller, C. J., in *Marsh vs. Nichols etc. Railway Co.*, 140 U. S., 354.

"This court cannot be called upon to conjecture that defenses existed which were not made and to decide that proceedings in a state court have denied due process of law because defenses were denied, when they were not presented. And especially must that be so where the court of last resort of the state, in review of all the proceedings has held that full opportunity to make each defense was afforded." Justice White in *Louisville etc. Railway Co. vs. Schmidt*, 177 U. S., 239.

VI.

The federal question must be made to appear in express terms Judicial knowledge will not be resorted to to locate the federal question.

Mutual Life Ins. Co. vs. McGrew, ~~188~~ 291 U. S., ~~309~~.

In this case at bar, the trial court could not have had the faintest suspicion of a federal question, and as a matter of fact there is not the slightest ground for supposing that plaintiff in error had anything in mind other than the unjustness of the assessment as compared with the assessments of the other banks. It is very plain that the federal question was not thought of until after the trial in the District Court and that it was dragged into the case in the Supreme Court as an afterthought.

VII.

In order to give this court jurisdiction a writ of error to the highest court of a state in which a decision in the state court could be had, it must appear affirmatively. 1. That a federal question was presented for decision by the highest court of the state having jurisdiction. 2. That its decision was necessary to the determination of the cause. 3. That it was actually decided, or that the judgment rendered could not have been given without deciding it.

No federal question was presented in the proper state court, for the only complaint made before the reviewing board and in the District Court was that the assessment "was in excess of the actual value of said stock and exhorbitant and unjust and that the taxable value thereof should be no greater sum than is obtained by adding the capital surplus and undivided profits of said bank, subtracted from the sum thereof the amount of the bank's capital invested in real estate and dividing the remainder by the number of its shares of capital stock, to obtain the true assessable value of one share of stock; also, that said stock is not assessed and valued in proportion to other like personal property in the city of Estherville, but is grossly in excess thereof, and unfair to these appellants (plaintiffs in error), and unequal taxation."

In order to determine whether or not plaintiffs in error were excessively and unfairly taxed, or whether or not they should be taxed upon a basis of the book value rather than actual or market value, did not require the determination of a federal question. It required the court to determine the matter of fact as to the excessiveness of the tax, as to whether or not the plaintiff bank had a greater burden thrust upon it than the other banks, and to get at the legislative intent as far as the state statute was involved.

The state constitution provided against unfair and discriminative taxation and provided adequate remedy without the court digging up a federal question.

Article III, Sec. 30, Constitution of Iowa.

No mention of the National Banking Act was made, nor any right or privilege claimed under it, nor were the provisions of the judiciary act invoked by name or otherwise. No federal question was decided, and the case could be very readily and fairly decided without a decision of a federal question for there was no allegation or issue in the case claiming the local statute to be in terms or by necessary intendment or effect to be in conflict with or repugnant to the terms of Section 5219 of the Revised Statutes, or the Constitution of the United States.

"It is well settled that where out jurisdiction depends upon the denial by a state court of title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was especially set up or claimed at the proper time and in the proper way and that the decision was against the right to set up or claimed."

California Powder Works Co. vs. Davis, 151 U. S. 393.

"When the jurisdiction of this court is invoked for the protection against the final judgment of the final court of a state of some title, right, privilege or immunity secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment from the record that such right, title, privilege or immunity was especially set up or claimed under such constitution or laws. * * * Our jurisdiction cannot arise in such case from the inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a federal right."

Kipley vs. Illinois, 170 U. S., 186.

"If a party to an action in a state court intends to invoke for the protection of his rights, the Constitution of the United States, he must so declare."

Chapon vs. Fye, 179 U. S., 129.

"Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed."

Northern Pac. Railway Co. vs. Austin, 135 U. S., 318.

"It must appear on the record or we cannot proceed. We act upon questions actually presented to the court below; not upon such as might have been presented or brought into the case, but were not."

New York Life Ins. Co. vs. Hendren, 92 U. S., 287.

"In order to give this court jurisdiction, the record must show that the point was brought to the atttention of the

state court and decided by it. It is not sufficient that the point was in the case and might have been raised and decided. It must appear that the validity of the statute was drawn in question and the judgment founded upon its validity. This is evidently the meaning of the 25th Section of the Act of 1789, which gives the writ of error. And the reason is obvious. The party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the Constitution and laws of the United States. But if he omits to claim it in the state court there is no reason to permit him to harass the adverse party by a writ of error to this court, when for anything that appears in the record the judgment of the state court might have been in his favor if its attention had drawn to its attention."

Grand Gulf Railway Co. vs. Marshall, 12 How., 167.

"To justify our taking jurisdiction, the federal question must be specially set up or claimed in the state court. The party must have the intent to invoke for the protection of his rights, the Constitution, or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner."

Keokuk etc. Bridge Co. vs. Illinois, 175 U. S., 633.

"It is also clear that where it is disclosed that an asserted federal question was not presented to the state court or called in any way to its attention, and where it is not necessarily involved in the decision of the state court, such question will not be considered by this court."

Citizens Savings Bank vs. Owensboro, 173 U. S., 643.

"It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal

nature. In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed it would be enough, or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below."

Dewey vs. Des Moines, 173 U. S. 199.

Oxley Stave Co vs Butler Co 166 U S 648.

"A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." Supra.

VIII.

Although it is true that under the third clause of Section 709 of the Judiciary Act, where a title, right, privilege or immunity is claimed under the federal law, such title, right, privilege or immunity must be especially set up or claimed and that no such provision is made as to cases within the second clause, but it none the less is true that the authority of the statute must "be drawn in question", by some one affected by the decision of a state court in favor of its val-

idity, and that in this particular, the three clauses of the section are practically identical.

Tyler vs. Judges of Registration, 179 U. S., 408.

And where a right is claimed under the Constitution, it must appear that the section of the Constitution that was relied on was brought to the notice of the state court, and that the right claimed in this court was claimed under it.

Maxwell vs. Newbod, 18 How., 511.

Susquehana Boom Co. vs. West Branch Boom Co., 110 U. S., 57.

The Victory vs. Boylan, 6 Wall., 382.

In their petition for rehearing in the state Supreme Court attorney for plaintiffs in error herein said among other things, "now in this case it is apparent that no statute or rule of court required such pleading; (that is the written pleading filed by plaintiffs). The object of the petition was to recite the proceedings that had taken place before the board of review, and in bringing the case into the District Court, and no thought was given to pleading either the statutes of the state or of the United States in the sense of reciting, quoting or stating their contents; for we have always understood that the general statutes of the United States and of the state of Iowa, were, at all times taken cognizance of judicially, and applied and enforced in the determination and decision of all questions that judicially arose before any board or court, exercising judicial functions within the state, and that such statutes entered as much into the decisions of the court as they do into every contract or agreement made with regard to subject matters affected by such statutes."

Plaintiffs also contended because they were not required by statute to file any formal pleading that it must be presumed that any matter that could have been legitimately pleaded must be considered raised.

In answer to these assertions we have to say that it is true that there seems to be no requirement for a written pleading either with the reviewing board or the District Court. But the fact is plaintiffs filed one in which they set out at length all the proceedings leading up to the appeal and in which they stated grounds for their complaint against the action of the equalization board, and when the case went to trial filed an amendment alleging the additional grievance of inequality. So under the circumstances, it must be presumed that appellants embraced in their pleadings all of the causes for complaint that occurred to them at that time as being material to the case, and defendants joined issue with them.

It must be presumed that they alleged every ground of complaint that occurred to them, because if such a pleading as was filed had not been filed, the allegations of plaintiffs would have been put in *viva voce* and entered by the judge in his minutes. By adopting the practice they did, they dispensed with the other method of making their complaint orally and having it entered by the judge in his minutes. It must be presumed that this petition in the District Court contained all of their grounds for complaint for appellee was entitled to the privilege of affirming or contradicting the allegations and offering evidence on any disputed point as to what questions were raised before the equalization board in the event that the records of the board did not show them.

Before deciding the question whether or not the shares had been taxed too high or on terms of inequality with other personal property of the city of Estherville, the court must take cognizance of the Iowa Statutes upon the subject, and naturally turns to Section 1322 of the Code which has to do with state taxation of national bank shares, and the court construing the same to mean that the assessor need not rely entirely on the statement mentioned therein which the bank is required to furnish, but may take into consideration

other information he may obtain, and construing that section in conjunction with 1305 of the Code, finds that the shares should be assessed at their market or selling value. Construing the statute that way the court has the remaining duty only of ascertaining whether the shares were taxed at more than their market value and whether they were taxed at a greater rate in proportion to the value thereof than other like personal property. This can all be determined from the facts in the case. If the shares are taxed too high the evidence will show it. If they are taxed on terms of inequality with other like personal property in the city of Estherville, the evidence will show it. There is nothing in the pleadings whatsoever, directly or indirectly involving Section 5219 of the United States Revised Statutes. Appellants argue that the state's power to tax national banks is determined solely from the National Bank Act and as the United States Statute is the foundation and source of the state power, therefore the National Banking Act is in issue in the case, and the court must take judicial notice of it and apply it. But the defendants, in error, contend that first of all the court is required to take judicial notice of the fact that the legislature of Iowa has enacted a statute providing a way for the taxation of national bank shares, and that the Constitution of Iowa provides for the uniformity and equality of taxation. And the court must take judicial notice of the fact that the acts of the legislature are presumed to be regular and legal and constitutional. The legislature when framing the statute had judicial cognizance of the fact that there was a National Banking Act and of the terms thereof, and its legislation bearing on the subject of taxation of national bank shares is presumed to be in conformity therewith and the burden is on appellants to establish the illegality of Section 1322 of the Code of Iowa.

Upon hearing the evidence in the case the court found

that the shares were not assessed too high and that the evidence did not disclose such a discrimination as to warrant interference. So plainly and unquestionably the court found that the board acted within the authority and in conformity with the sections of our statutes which relate to taxation of national banks, and there being presumption that said statute was in conformity with the United States Revised statutes on the subject, the only way that a federal question could arise in the case was by a plain and unequivocable reference to it. It was necessary that it be stated in such terms as to call it to the attention of the court. If plaintiffs in error believed that the local statute was unconstitutional and invalid because of conflict with the federal Constitution or statutes, it was an easy matter for them to have said so and they should have said so. Otherwise the board of Review and District Court must presume that their complaint was as to only the construction placed upon the Iowa statute and a failure to comply with the terms and intent thereof in raising said assessment to a valuation in excess of the book value of said stock and out of proportion to the valuation of like personal property in the city of Estherville.

Our local statute was an inpenetrable barrier to a discussion of a federal question, until its validity had been properly brought into question.

Plaintiffs in error in their petition for a reharing claimed that in order to introduce the federal question, it was only necessary to produce the facts laying bare a case to which the federal statute applied. The case that they reveal is one in which we believe that the highest sense of justice and most discerning mind could see no necessity for an application of any laws other than those of the state of Iowa.

If arguments of plaintiff's in error were correct and true, it would follow that the most usual and ordinary disputes in-

volved federal questions and would have a right to a hearing before this honorable court, because the foundation and source of all authority and power of public officials is in the Federal Constitution. It is necessary to have various courts with limited jurisdiction well defined, and that the great net work of our judicial system permit the less important questions fall through the graduated sieves until they lodge upon the mesh that holds them up for investigation in a particular tribunal, and that of all matters unearthed in and taken up from a state court to the United States Supreme Court, only such matters as constitute a federal question and of enough moment to require the action of the court in order that the citizen get justice. If there is a state court equipped with the power and disposition to solve the difficulty the case should stop there and go no further.

IX.

It is the invariable rule of this court that the federal question must be set up or claimed in the trial court whenever under the state practice, the highest court of the state in reviewing the judgments of the trial court refused to consider questions not raised in the trial court of the state. The federal question was not raised in the trial court. In fact it was not raised until the case had been appealed to the Supreme Court of the state. The only questions raised in the District Court and likewise before the board of review were:

1. Whether or not the valuation fixed by the board of review was in excess of the actual value of said stock and exorbitant and unjust.

2. Whether the proper assessed valuation was the book value of the shares, that is to say, $112 per share; or whether it was the market value of the shares of stock.

3. Whether or not said stock was assessed and valued out of proportion to other like personal property in the city

of Estherville, and grossly in excess thereof and unfair to appellants, (plaintiff's in error herein).

None of these questions could in any way be construed to be federal questions.

X.

It is an invariable rule of the Supreme Court of Iowa to refuse to hear upon the appeal of a case, a matter that is there introduced for the first time and could have been presented before the trial court, but was not. Its decisions upon this point are so numerous that the best that we can do in this argument is to cite a number of such decisions.

Zion Church Company vs. Parker, 114, Iowa 1.
Petty vs. Mu. Fire Ins. Co. 111 Iowa, 359.
Smith vs. McQuiston, 108 Iowa 363.
Ross vs. Hawkeye Ins. Co., 93 Iowa 222.
See also other cases cited in law points preceding this argument.

In the Supreme Court of Iowa a party will be bound by the case made by the pleadings and evidence as exhibited by the record.

Joyce vs. Perry, 111 Iowa, 567.
Dubuque Lumber Co. vs. Kimball, 111 Iowa, 48.
Mason vs. Des Moines, 108 Iowa, 658.

Nor is it permissible to foster a different theory.

In the lower court, the plaintiffs in error (herein) proceeded with their case on the theory that the interpretation they gave to Section 1322 of the Code of Iowa was correct and that under the statute shares of stock of national banks could not in Iowa be taxed at more than their book value ascertained in the manner they contend the book value and

taxable value of the shares be ascertained. Then on appeal in the District Court they reversed their position and contended that the statute is in conflict with the terms of Section 5219 of the Revised Statutes. In other words they proceed with their case in the Supreme Court on an entirely different theory than they held in the lower court. This is not permissible under the Iowa practice.

Ross vs. Hawkeye Ins. Co., 93 Iowa, 222.
Hopper vs. Chi. etc. Railway Co., 91 Ia., 639.
Miner vs Rhynders, 111 Ia., 725.
Dormory vs. Knower, 55 Iowa, 722.

Nor can matters left out on the trial in the lower court by oversight be supplied to and brought into the case in the state Supreme Court.

Patterson vs. Stiles, 6 Iowa, 54.
Latteret vs. Coo, L. Iowa, 1.
Brazelton vs. Jenkins, 1 Morris (Ia.) 15.

These rules apply not only to law cases but to equity cases triable *de novo* as well.

Zion Church Co. vs. Parker, 114 Iowa, 6.
Manufacturing Co. vs. Hasbrook, 68 Iowa, 554.

This is an equity case triable *de novo*.
Iowa Code, Section 1373.

It may be stated also that Section 1373 of the Iowa Code does not authorize the Supreme Court of Iowa to perform any other function than that of determining the correctness of the assessment with reference to the complaints made by the appealing tax payer in the trial court. *Farmers' Loan & Trust Co. vs. Fonda*, 114 Iowa, 732; *Railway Co. vs. Cedar Rapids*, 106 Iowa, 476. Accordingly the only issue in this

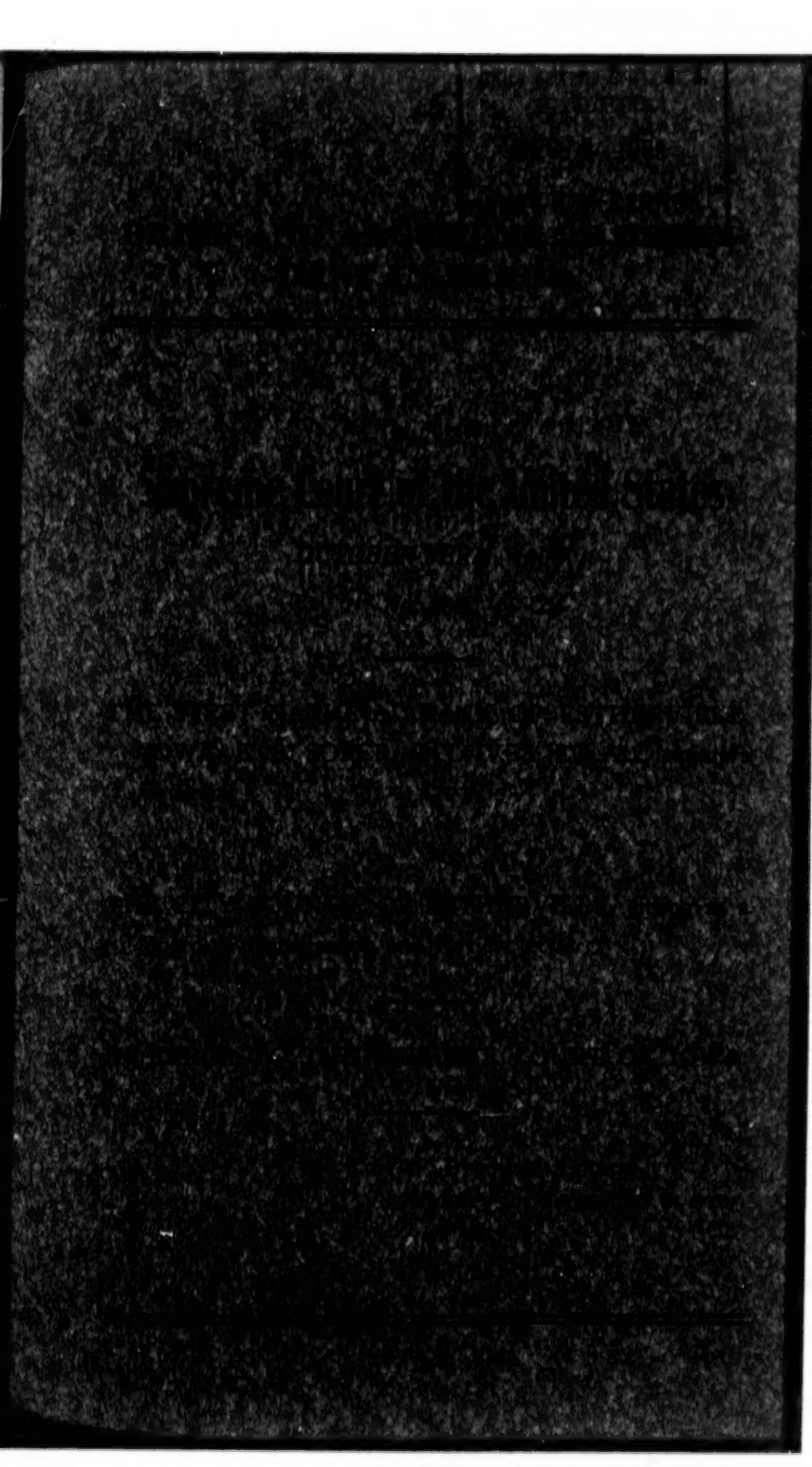
proceeding is whether appellants shares of stock were assessed higher than the average of other personal property assessable in the city of Estherville, Iowa.

See also Article III Sec. 1 and Article V Sec. 1 of the Iowa Constitution.

Respectfully submitted,

BYRON M. COON,

Attorney for defendants in error.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

No. ~~262.~~ 64

THE FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. SOPER, C. J. IVES, ET AL., *plaintiffs in Error,*

vs.

THE CITY COUNCIL OF ESTHERVILLE, sitting as a Board of Equalization and Review, et al.

In Error To The Supreme Court Of The State of Iowa.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

PART TWO.

Law Points.

Market Value.

1. The law provides for the assessment of shares of stock in national banks at their actual value which means their market value.

Sections 1305 and 1322 of the Code of Iowa.

San Francisco National Bank v. Dodge, 197 U. S. 78-80.

First National Bank of Wellington v. Chapman, 173 U. S. 673.

Exchange National Bank v. Miller, 19 Fed. Rep. 377-384.
German-Amer. Bank v. City Council of Burlington, 118 Iowa, 84.
Ankeny v. Blakely, 74 Pac. 485.
Sanford v. Peck, 27 Atlantic 1057.
National Bank of Commerce vs. New Bedford, 155 Mass. 313-15.

PART III.

Discrimination.

1. That the shares of stock of national banks in the hands of the shareholders may be taxed is now beyond questioning. The disputed question before the courts has often arisen as to the validity of the particular tax, because of the method of assessing it or some other alleged inequality or discrimination.

Section 5219 of U. S. Revised Statutes.

2. The shares of stock and the capital stock of a corporation are two separate and distinct species of property, and the capital stock and shares of stock of the corporation in the hands of the shareholder may be both taxed, and it is not double taxation.

Van Allen v. Assessors, 3 Wall, 573.
Bank of Commerce v. Tennesee, 161 U. S. 146.
Owensboro v. Owensboro, 173 U. S. 669.
New Orleans vs Houston, 119 U. S. 265, 7 Sup. Ct. Rep., 198.
Evansville Nat. Bank vs Britton, 105 U. S., 322.

3. Shares of stock of national banks are subjected to state taxation in the hands of the shareholders, although the whole amount of the capital stock is invested in public securities declared by act of Congress to be exempt from taxation.

Van Allen v. Assessors, 3 Wall. 573.
People Ex Rel Kennedy v. Commissioners of Taxes, 35 New York, 423.
First National Bank v. Board of Reviewers, 41 La. Ann. 181.
Wright v. Stilz, 27 Ind. 338.
People v. Bradley, 39 Ill., 130.
Provident Inst. for Sav. v Mass., 6 Wall. 611.
First National Bank v. Kentucky, 9 Wall. 353.
Lionberger v. Rouse, 9 Wall. 468.
New York ex rel Duer v. Com. of Taxes, 9 Wall. 244.
Tappan v. Mer. Nat. Bank, 19 Wall. 459.
Van Slyke v. Wisconsin, 154 U. S. 581.
Van Allen v. Assessors, 3 Wall. 573.
Merc. Nat. Bank v. N. Y. 121 U. S. 138

4. The assessment of National bank stock at the market value, while private moneyed capital is assessed at its value, without taking into consideration intangible assets which may be connected therewith, is not violation of Section 5219 of the United States Revised Statutes.

U. S. Rev. Stat. Sec. 5219.
Mercantile Bank v. New York, 121 U. S. 138.
Davenport Bank v. Davenport, 123 U. S. 83.
First National Bank v. Chapman, 173 U. S. 205.
National Bank v. Mayor of N. Y., 121 U. S. 138.
National Bank v. Davenport, 119 U. S., 700.

5. The adoption of a different method for taxing state banks and other moneyed corporations from that adopted for the taxation of national banks, does not necessarily conflict with U. S. Revised Statutes Section 5219, authorizing state taxation of shares of stock in national banks, but exacting that the tax when levied shall be at no greater rate than that imposed on other moneyed corporations.

San Francisco National Bank vs. Dodge, 197 U. S.

Covington v. First Nat. Bank, 198 U. S. 100, 25 Sup. Ct. R. 562.

Davenport vs. Davenport Board of Equi., 123 U. S. 83.

First National Bank vs. Chapman, 173 U. S. 205, 19 S. C. R. 407.

Ankeny v. Blakely, 44 Oregon, 78, 74 Pac. 485.

Nat. State Bank of Burlington, 119 Ia. 696, 94 N. W. 234.

Davenport Nat. Bank v. Davenport, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Court Rep. 73.

6. If the rate of taxation by the state on shares in a national bank is not greater than upon the moneyed capital of the individual citizen which is subject to taxation—that is if no greater proportion of tax on the valuation of the shares is levied than upon other taxable moneyed capital in the hands of citizens—the tax is valid, and it is immaterial that in determining the value of the shares, the amount of capital invested in U. S. bonds is included.

N. Y. v. Com., 4 Wall, 244.

Adams v. Nashville, 95 U. S. 19.

First Nat. Bank v. Farwell, 10 Biss., 270, 7 Fed. Rep. 518.

7. Simply because some kind of moneyed capital, such as savings banks and trust companies, are exempt, it does not follow that it was the intention of Congress to exempt bank shares from taxation.

Hepburn v. School Directors, 23 Wall. 480, 23 L. ed. 112.

First National Bank vs. Ayers, 160 U. S. 660, L. ed. 573.

Adams v. Nashville, 95 U. S. 19. 24 L. ed. 369.

8. Unless it was the manifest intention of the legislature to adopt a mode or system of taxation in itself discriminative, and unfavorable to national banks, or unless it appears that the system adopted works an actual and material discrimination, the courts will not hold the statute unconstitutional, or void as being in conflict with Section 5219 of the Revised Statutes of the United States.

Davenport National Bank vs. Davenport, 123 U. S. 85.

First National Bank of Chicago vs. Farrell, 7 Fed. Rep. 518.

Stanley vs. Albany Co. Supervisors, 15 Fed. Rep. 483.

Richard vs. Rock Rapids, 31 Fed. Rep. 505.

Exchange National Bank vs. Miller, 19 Fed. Rep. 372.

9. Congress does not require perfect equality of taxation. Taxation is not an exact science but is as it were an imperfect art.

Davenport v. Davenport, 123 U. S. 585.

Exchange National Bank vs. Miller, 19 Fed. Rep. 372.

10. The Burden of proof is on the appellant in the District Court and Supreme Court to show that the valuation was too high.

Frost v. Board of Rev., 114 Iowa, 103.

11. The only question to be considered in this proceeding is whether appellants' shares of stock were assessed higher than the average of other personal property assessable in the city of Estherville, Iowa.

Art. 5, Sec. 1, Constitution of Iowa.
Code, Sec. 1373.

12. There can properly be no issue in this case suggesting the invalidity of Section 1322 of the Code of Iowa as being in conflict with Section 5219 of the Revised Statutes of the United States, relative to the assessment of shares of stock of national banks, as this is purely an appeal from an alleged excessive assessment.

Brown vs. Grand Junction, 75 Iowa, 488.
Farmers Loan & Trust Co. vs. Fonda, 114 Iowa, 728.
Montis v. McQuiston, 107 Iowa, 651.
Collins vs. Keokuk, 91 N. W. 791.
Rood vs. Board, 39 Iowa, 444.

13. The only question to be considered in this proceeding is whether appellant's shares of stock were assessed higher than the average of other personal property assessable in the city of Estherville.

Art. 5, Section 1, Constitution of Iowa.
Code, Section 1373.

PART TWO.

VALUE.

I.

The sections of the Iowa Statutes bearing upon this controversy are:

Article 5, Section 1, Constitution of Iowa which provides: "The judicial power shall be vested in a Supreme court, district court, and such other courts, inferior to the supreme court, as the general assembly may, from time to time establish."

Article 3, Section 30 of the Constitution of Iowa which provides:

"The general assembly shall not pass local or special laws in the following cases:

"For the assessment and collection of taxes for state, county or road purposes; * * * * * * * * * * * *

"In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state; * * * * * * * * * * * *

Sec. 1305 (Code). Valuation. All property subject to taxation shall be valued at its actual value, * * * * * * Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade."

Section 1309. *Credits defined.* The term credit, as used in this chapter, includes every claim or demand due or to become due for money, labor or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title, bond, mortgage or otherwise; but pensions of the United States or any of them, or salaries, or payments expected for services to be rendered, are not included in the above term.

Section 1310. Moneys, credits and corporation shares of stocks, except as otherwise provided, cash, circulating notes of national banking associations and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities and corporation shares of stocks not otherwise taxed in kind, shall be assessed as provided in this chapter."

Section 1311. *Deducting debts.* In making up the amount of money or credits which any person is required to list, or to have listed or assessed including actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of this section. * * * * * * * * * * * and no person shall be entitled to any deduction on account of any indebtedness contracted for the purchase of United States bonds or other nontaxable property."

Section 1321. *Private bankers.* Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations and the amount of checks or other cash items not included in either of the preceding items;

2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

3. The amount of all deposits made with them by others, and also the amount of bills payable;

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and of debts owing by such bank as provided in this chapter, and the aggregate actual value of bonds and stocks, after deducting the portion thereof exempt, or otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five (1305) of this chapter, not including real estate, which shall be listed and assessed as other real estate.

Sec. 1322. *National State and Savings banks.* Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares of stock of such corporation, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interest, if any) on or in which the bank or trust company is located,

shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed.

Section 1370 of the Code provides that in cities and towns the city or town council shall constitute the board or review, and names the time and place of meeting, and states that it "shall adjust assessments for the township, city or town by raising or lowering the assessment of any person, partnership, corporation or association as to any or all of the items of his assessment, in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value, and shall also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof, as the assessor should have done."

Section 1371 of the Code provides that the clerk of the council shall act as clerk of the board, and the manner in which the board shall conduct the review of the assessment rolls is directed.

Section 1372 of the Code provides for the manner of giving the persons whose assessments are raised by the board notice of the assessment raised.

Section 1373. Complaint to board of review—appeal. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor who shall correct the assessment books

in his office accordingly. * * * Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from."

II.

Relative to the valuation of the stock, the trial of the case brought out the following testimony. Mach J. Groves on behalf of the appellants (plaintiffs herein) testified (See Trans. p. 31 et seq.), that he was by occupation a lawyer, and president of an insurance company, and Mayor of Estherville. He presided as chairman of the board of review. We equalized them (the assessments) between the several banks according to the best of our judgment. I am a director of the Iowa Savings Bank and know the affairs of the bank. I know what the stock has been selling for. I knew the dividends they paid; and knew the general condition of the bank and we assessed the stock at $120 per share. With regard to the state bank, all I knew was what I got from the papers, and what the officers of the bank had told me. We assessed that bank at $120 per share. The First National we assessed at $144, $14 on each share being for real estate and $130 for money. The capital stock of the Iowa Savings Bank was $50,000. We assessed at $120 per share. It paid 10% dividends annually. It had $10,000 surplus. There was very little earnings on the first of January. The $15,000 deduction was made for a farm owned by the bank over in Dickinson county. There was a farm loan on it when we got it which I think was assumed by the bank. I did not say that we changed the assessment of the Iowa Savings Bank from that made by the assessor. The last transfer of stock of the Iowa Savings Bank made previous to the sitting of the board was at $137.50 per share. I ascertained before I was sitting with the city council as a board of equalization what the bank stock of the Frst National Bank was selling for. It was selling at $175 per share. We attempted to equalize the assessments on the stock in propotion to the rise in value. I might in addition say that we gave the First National Bank the benefit over the other two banks; that is we scaled down the assessments of that bank further than any other in proportion to the assessment levied as to what the shares were

selling at, and what they were bringing in the market. In assessing the stock in the savings bank, we aimed to assess them at such an amount as would be fair between all the banks and such an amount as would not work an injustice on either bank, or the owners of the stock, they could realize the same as any other moneys and credits, the same as though they were dollars.

To the best of our judgment, we attempted to place upon the different shares their actual value.

I have the word of the cashier, and some of the others have told me of what the shares in the First National Bank were selling at. * * * * The stock of all the banks are pretty readily sold. You can find a market any time. * * * * Mr. H. C. Coon testified: (See Trans. page 35) That he "owned some stock of the First National Bank about a year ago. I do not remember what I paid for it. This bank stock I had was something I attached. I sold it to John Montgomery about a year ago. He paid me $175 per share for it. There were ten shares."

Mr. Groves testified that he knew John Montgomery and that he was an officer of the First National Bank and had been for about two years.

III.

It is the contention of appellant that the provision of our statute for the taxing of shares of national banks and shares of stock in other banking institutions, should be construed to mean that such shares should be taxed on their book value. By such a construction appellant would make it appear that its shares of stock had been assessed higher than contemplated by law. Under the requirements of our statutes and the definitions of the word "value", "real value" and "actual value", laid down by the courts, such a construction is out of the question. Section 1322 of the Code provides that: "to aid the assessor in fixing the value of such shares" the corporation shall furnish a statement, etc., "and the assessor from such statement and such other information as he can

obtain, * * * * shall fix the value of such stock * * * * value of the real estate shall be deducted from the *real value* of such shares." It will be seen that the assessor is not to fix the value of the stock from the statement given by the bank, which statement is the book value thereof; but such statement is to be taken as an aid in arriving at the true value.

The language of Section 1323, with reference to the word value, is the same with the addition of the following: "but arriving at the *total value*, of such shares, etc., the total value of the real estate shall be deducted. Section 1305 is as follows: *All property*, subject to taxation shall be valued at its *actual value*, * * * * Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade." So if there was any chance for a question as to the interpretation of the word, "value" or "real value" as used in the chapter, and sections 1322 and 1323 thereof, section 1305, furnishes a clear, definite and mandatory rule by which the courts are to be governed.

However, without the aid of Section 1305, the law is well settled that the word "value" or "actual value", used in such connection, means market value, which is such value, as the market, in the ordinary course of buying and selling, places on the article. In *San Francisco Bank vs. Dodge*, 197 U. S., 70, Justice White says: "Under the law shares in national banks must be valued at their full cash value, which the statute defines to be the amount at which they would be taken in payment of a just debt from a solvent debtor. These words are but synonomous with the requirement that, in assessing shares of stock their market value must be the criterion." Also in discussing the term "market value" Justice White uses the following language:

"What, then, was embraced in the assessment of the shares of stock at their full cash or selling or market value? It embraced not only the book value of all the assets of the corporation, but the good will, the dividend earning power, the ability with which the corporate affairs were managed,

the confidence reposed in the capacity and permanency of tenure of the officers, and all those other indirect and intangible increments of value which enter into the estimate of the worth of the stock, and help to fix the market value or selling price of the shares." Following this language of Justice White he quotes from a number of decisions showing how other courts have defined market value is the selling value, and therefore includes many elements aside from the naked capital of the bank or book value of the stock.

In *Ankeny vs. Blakely*, 74 Pac. 485, the same contention was made, as the council for appellants are making in this case viz: that shares of stock should be valued at their book value, in lieu of their market or selling value. In this connection the Supreme Court of Oregon said:

"Having ascertained meaning and purpose of Congress in the adoption of section 5219, *supra*, we will determine what standard of value should be adopted for the assessment of shares in bank stock, it being insisted that the measure of such value is the face or par value of the paid up capital stock, increased by the undivided earnings or profits of the bank; that, while other species of personal property may fluctuate, and its value be best determined by what it will bring in the market, the value of shares of bank stock remains constant and invariable, so long, at least, as the capital remains intact and unimpaired and is capable of exact ascertainment; and, that therefore, in view of the statutory directions that such shares shall be taxed at their par value, it was intended that the book value should be the test, and not the true cash value, as it is elsewhere directed that personal property shall be valued at for the purposes of taxation. B. & C. Comp. Section 3058. In this we are unable to agree with counsel. The section just noted prescribes that all personal property not exempt from taxation shall be

valued at its true value in cash. Shares of bank stock are personal property, and there is nothing in the language employed by Section 3042, *supra*, to betoken or signify any intention on the part of the legislature to set a different standard of value for that particular species of personal property, or that it should constitute any exception to the general provision, and, not being money which determines its own value, it must likewise be measured as other personal property, at its true cash value."

PART THREE.

Discrimination.

I.

Their complaint, if any, would be only that the other banks were assessed too low. Appellants were also assessed too low. If it were a fact that the City Council erred in its action both as to the national bank and the state banks, it is no argument that because its error and mistake was greater in the case of the national bank, it should even up the errors as between the two classes of banks, thereby making deliberately and knowingly a third error.

Although appellants contend that the other banks were assessed too low, they do not say that they, appellants were assessed too high, and offer nothing in the way of a remedy. They do not contend that the assessments on the others banks could be raised and any inequality that might have existed be satisfied. Nor do they claim that the inequality that they suggest existed was anything more than a mistake of error of judgment of the taxing officers. They do not contend that it was necessary under the statute, or was the intention and purpose of the officer. It is very evident, in view of the de-

cisions of this court and of the plain terms of the statute that it was not intended that the par value of the shares of bank stock, national or otherwise should be the taxable value. There is no evidence to show that the other banks were assessed too low. If they were, the matter could not be remedied at this time, because there is no way of raising the assessment, without re-arranging the whole assessment roll.

People vs. Board of Assessors of Albany, 2 Hun, 583, (N. Y.)

The figures representing the financial condition of the various banks in themselves do not show, even conceding that the banks were assessed too low, that any greater burden of tax was cast upon appellant bank that upon the others.

It appears that the Bank of Estherville, which is a private bank was assessed on the full amount of its capital. It is true that this bank must have realized enormous profits from its investment, yet there is nothing in the record in the case to show that this bank has not paid all the taxes required of it by law, and appellants do not make any claim in their argument on file herein nor have they made any claim elsewhere in the proceedings that the laws of this state could be so remedied as to make private banks pay more taxes, and an equilibrium of taxation as between the different kinds of banks be established. The whole complaint seems to be that this bank is making enormous profits on a small investment, and for that reason it is unjust that the First National Bank shareholders should pay taxes on a valuation in excess of the book value of the shares. And that because the other banks would be entitled to a deduction on account of capital invested in bonds the First National Bank should be entitled to such a deduction.

Where is the practised discrimination, the willful and premeditated favoritism? There is nothing to it. When the

valuation of the First National Bank shares were raised, so were the shares of the other two institutions.

In acting with relation to the 1906 assessment the Board of equalization relied to some extent upon the fact that the most recent transfers of stock in the Savings Bank were $137 and in the First National at $175.00, and in raising the assessments to $120 and $144 respectively, the First National Bank was given the benefit of the doubt so far as any question of inequality was concerned. There was nothing to show any recent transfers of stock in the State Bank, but its assessment was raised to $120 per share as in the case of the Iowa Savings Bank, the valuation of the shares being arrived at, in all probability, from the condition of the bank, as seen through its financial statement.

First National Bank vs. City Council, 112 N. W. 829.

The Bank of Estherville was assessed in 1906 upon the book value of its assets, obtained by striking a balance of the bills receivable and money payable on one side, and debts and deposits on the other. It is true this bank had enormous deposits. It is true the profits of the private bank were larger for the capital invested. However, it must be borne in mind that the great amount of deposits of the bank were paying their share of taxes as "moneys and credits" of the depositors.

The last transfers of stock of appellant bank were at $175 per share to an officer of the bank, a good judge of values. Appellants contend that there is nothing in the record in this case to show what was the value of the shares of stock of appellant bank in 1906. Evidence was introduced on the trial of the case to the effect that H. C. Coon, sold some shares of stock in the said bank to John Montgomery between April and November, 1905 for $175 per share, and that

the said Montgomery was an officer of the said bank. There was deliberation and discussion among the Board in regard to the assessment of the stock of the First National Bank which was assessed at $130 per share. The Board tried to get at as near as possible what they considered the market value of the stock. This evidence of Coon and Groves is unrefuted. The evidence of Coon and Groves clearly establishes the value of the stock in 1905, and Grove's evidence clearly shows that the Board carefully investigated the value of the stock in 1906 and were unable to arrive at any other conclusion than that the stock was worth $175.

There is a presumption that the Board acted fairly and legally and reached a correct conclusion as to values and the burden is on the appealing taxpayer to overcome this presumption, and establish the injustice and inequality of the raised assessment.

King vs. Parker, 73 Iowa, 757.
Frost vs. Board, 114 Ia., 103.
Bank vs. Estherville, 112 N. W., 829.

But aside from the presumption of the correctness of the Board's conclusions which has not been overcome, is the undisputed evidence of Coon as to values in 1905, and Grove's testimony as to the investigation made by the Board in 1906.

It having been shown that the stock was worth $175 in 1905, in the absence of any evidence to show anything to the contrary, there is a presumption of a continuation of the same valuation. So there can be no question but that the shares of appellant bank were worth as much or more January 1st, 1906 as on January 1st, 1905.

Now, then, considering the market value as the taxable value of the stock was there a discrimination against the First National Bank? The Iowa Savings Bank and State Banks were raised to $120 and the appellant bank to $130 per share.

Iowa Savings Bank stock was worth $137.50 and First National Bank stock $175. The valuation placed on the Iowa Savings Bank stock was fixed at 78 per cent of its actual value. And the valuation placed on the First National Bank stock was fixed at 74 per cent of its actual value. So, the discrimination, if any, was against the Savings Bank. The Board saw fit to assess the State Bank on the same basis, and we believe we are privileged to assume that the stock was worth no more than the Iowa Savings Bank's. Nothing was produced in the way of evidence to show how the assessments of the banks compared with other personal property banks in the city. Nor was anything offered by appellants to show that the Bank of Estherville was raised or lowered or finally fixed at the figures made on the same by the assessor. It is certainly evident that the Bank of Estherville was assessed on its tangible assets. On the other hand there is nothing in the way of evidence to show that the Bank of Estherville had anything in the way of intangible assets. Nothing is offered to show that the bank's good will or business was worth anything. There is nothing to show that intangible assets were not included.

II.

The only method the state has of taxing National Banks is by taxing the shares.

U. S. Rev. Statutes, Sec. 5219.

Covington v. First National Bank, 198 U. S., 968.

The state has no power to assess the capital in any other way directly or indirectly.

Covington vs. First Nat. Bank, 198 U. S. 968.

Owensboro vs. Owensboro, 173 U. S., 664.

The sole power of the state to tax national banks is derived from Congress, and the only limitations placed upon

the state in taxing them are two in number: 1: That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of the state; and 2: That the shares owned by non-residents shall be taxed in the city or town where the bank is located. With the last of these provisions we are not concerned. After Congress had given the state the right to tax the shares, its only concern was that the empowering statute be strictly followed, and that the national banks be treated at the hands of the state as fairly as the domestic banks. If Congress had desired that the state follow any particular form or method of process, it would have outlined and defined it. But it did no such thing. It left the procedure to the state. Section 5219 of the Rev. Statutes has been construed time and time again by the State and Federal Courts and the United States Supreme Court to mean that all that is required is that the same rate of taxation be applied to national as well as state banks.

III.

In *Van Allen vs. The Assessor*, 3 Wall., 584, it was said:

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of its shares; and upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the state, under the limitations prescribed, as will be seen on referring to it." * * * *.

"This is an answer to the argument that the term (shares), as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not

invested in the bonds of the government, and that the state assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction." * * *.

"Upon the whole, after the maturest consideration which we have been able to give this case, we are satisfied that the states possess the power to tax the whole of the interest of the shareholders in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization."

The mere fact that private banks, savings banks or state banks are allowed certain privileges and deductions is no reason why national banks must be given the same privileges and deductions in the same way. All that is required is an equitable treatment of all banks.

San Francisco National Bank vs. Dodge, 197 U. S., 70.
National State Bank vs. Burlington, 119 Ia., 696.
Mercantile Bank vs. New York, 211 U. S., 138.
First National Bank vs. Chapman, 173 U. S., 205.
Davenport Bank vs. Davenport, 123 U. S., 83.

IV.

In *First National Bank vs. Wellington*, the court remarked:

"That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless and idle to attempt it. Equality, so far as the differing facts will permit, is all that can be aimed at or reached." * * *

"If the value of the national bank shares is increased by reason of the franchises of the bank itself, as claimed by the plaintiff in error, while no such added value obtains in the case of unincorporated banks, there is no discrimination against bank shareholders on that account. This is simply a case where the added elements of value exist in bank shares which are absent in the case of unincorporated banks."

And in *National Bank vs. Burlington*, it was said:

"Third, that the taxation of private banks and bankers on the aggregate value of the property invested in the business, while incorporate banks, including national banks, are taxed by means of an assessment of the value of the corporate shares does not constitute a discrimination as against national banks, although in the one case United States bonds are treated as exempt and deduction from the aggregate value of bonds and stocks while in the other case, the value of corporate shares is determined by including United States bonds. * * *

"'That there may be a distinction in the method of assessment between one whose property is invested in an individual partnership business, and another whose property is represented by shares of stock in a corporation, is too clear to require extended argument, and that such a distinction in a method of assessment would not constitute a discrimination against national banks, which are assessed in the same way as other banking corporations is put at rest by decisions of the Supreme Court of the United States, among which may be cited *Merchants Bank vs. New York*, 121 U. S., 138; *Davenport Bank vs. Davenport*, 123 U. S., 83."

In the latter case the court said in part:

"The statute of the state taxes savings banks, on the amount of its paid up capital, and does not tax the shares of those banks held by the individual shareholders. The proposition of the council seems to be that the capital of savings banks can be taxed by the state in no other way than by an assessment upon the shares of that capital held by individuals, because under the act of Congress the capital of the national banks, can be taxed only in that way. It is strongly urged that in no other mode than by taxing the stockholders of each and all banks can a perfect equality of taxation be

obtained. The argument is not conclusive, if the proposition were sound; for the act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of the national banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals. That this does not mean entire equality is evident from the fact that, if the capital of the national banks were taxed at a much lower rate than other moneyed capital in the state, the bank would have no right to complain, and the law in that respect would not violate the provisions of the act of Congress for the protection of national banks.

"It has never been held by this court that the states should abandon systems of taxation of their own banks or of money in the hands of other corporations, which they may think the most wise and efficient modes of taxing them our corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that it has ever held to be necessary is that the system of state taxation of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any further. Within these limits, the manner of assessing and collecting all taxes by the state is uncontrolled by the act of Congress. In the case before us the same rate per cent. is assessed upon the capital of the savings bank as upon the shares of the national banks. It does not satisfactorily appear from anything found in the record that this tax upon the moneyed capital of the savings banks is not as great as that upon the shares of stock in the national banks. It is not necessary nor a probable inference from anything in this system of taxation that it should be so, and it is not shown by any actual facts in the record that it is so. If then, neither the necessary, usual or probable effect of the system of assessment discriminates in favor of the saving banks against the national banks upon the face of the statute. Nor is any evidence given of the intention of the legislature to make such a discrimination, or any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional. The whole subject has been recently discussed in *Mercantile Bank vs. New York*, 121 U. S., 138."

V.

In *Stanley vs. Albany County Supervisors*, (C. C.) 15 Fed. Rep., 483, it was said:

"It is not sufficient to invalidate the taxation of national bank shares to show that in the case of a single state bank the shares of which are subject to a like taxation, the assessors, either by mistake or intention have shown favor. The system of assessment of bank shares, owing to the fact that the shares of differently rated, must necessarily be imperfect, and the law does not require absolute accuracy. It was the intention of Congress to prevent the state by hostile legislation, and the taxing officers by a hostile rule, from discriminating against national banks, and to place all bank shares, state and national on a common level. When the shareholders have the same rights as other individuals taxed for moneyed capital, they should look to the statute of the state for relief."

In *Northward Nat. Bank v. Newark*, 39 N. J., Law, 380, the court said:

"The mode in which the tax shall be assessed and collected and the place where it shall be laid on resident stockholders being left to the discretion of the legislatures of the states in which the banks are respectively located."

In *Jenkins vs. Neff*, where capital of trust companies invested in government securities was deducted from the capital, but no deduction of the securities in national banks, it was held that there was no violation of Sec. 5219, U. S. Rev. Stat. since the further use of such trust companies after said investment is lost, but the banks which are allowed to issue notes which are used as money upon the security of the U. S. Bonds do not thereby lose the use of the money so invested. *Jenkins vs. Neff*, 62 N. Y. State, 321, 57 N. E., 408.

VI.

A mere difference in the method of taxation between national banks and other banks does not constitute a discrimination, in the statutory sense, and a law is constitutional which taxes savings banks on the amount of its paid up capital stock, and does not tax shares of such banks held by the individual shareholders, and no inequality of taxation results from taxing shares of National banks separately to their owners and taxing shares of state banks collectively to the bank. A tax on the capital of the bank may therefore be sustained as being in effect a tax on all the stock.

Primghar State Bank v. Rerick, 96 Iowa, 238.
Richards v. Rock Rapids (C. C. 31) Fed. Rep., 505.
First National Bank v. Covington (C. C.) 103 Fed. Rep. 523.
Davenport Nat. Bank v. Mittlebuscher (C. C.) 15 Fed. Rep. 225.
First National Bank of Albia v. City Council, 86 Iowa 34.
Iowa State Savings Bank v. Burlington, 98 Iowa, 737.

Again in *First National Bank v. Chapman, supra*, it is said:

"If the value of the national bank shares is increased by reason of the franchises of the bank itself, as claimed by the plaintiff in error, while no such added value obtains in the case of unincorporated banks, there is no discrimination against bank shareholders on that account. This is simply a case where the added elements of value exist in bank shares which are absent in the case of unincorporated banks."

There is a marked difference between taxing the intangible assets or good will of a private bank and the shares of a national bank above their market value. The business of a pri-

vate bank is due largely to the skill and efforts and business management of the owner of the capital and the confidence the people have in him, and if he was made to pay a tax upon the intangible assets of the bank, he would in effect be taxed upon his earning capacity. If a banker should be thus taxed, why should not any other person who is making money by means of his own ingenuity, judgment, and business ability? On the other hand tax bank shares at their market value in a case where market value exceeds the par or book value, although the market price is dependent largely upon the skill and business management of the bank's officers, the owner of the shares is being taxed upon property in his hands to the value of which his own skill and management has not contributed unless he is an officer or director of the bank.

Appellants contend that inasmuch in *Home Savings Bank v. Des Moines*,, 205 U. S., 503, the Supreme Court held that government bonds are exempt from state moneyed institutions it must follow, that in ascertaining the value of national bank shares for taxation purposes, government bonds must be deducted, otherwise the statute must necessarily work a discrimination against national banks. It was the intention of the legislature that although in the case of state and Savings banks the tax should be assessed to the bank, yet the shares should be the measurement of value. In the *Home Savings Bank* case it was held that the tax was in reality a tax upon the capital and not upon the shares, yet at the same time in assessing the bank for taxation the aggregate value of the shares should be taken, and the value of the government bonds might be deducted. It could not be truly said that because of this deduction, a discrimination was effected in favor of the state institutions, because in as much as the tax was upon the bank, the shareholders in paying their respective pro rata of the tax are not allowed any offsets on account of debts as in the case of owners of national bank stock. Moreover, the national

bank has advantages that more than overbalance any advantage given the state institution on account of deduction of government bonds. Among them may be mentioned, (quoting from *Van Allen v. Assessor, supra*):

"The powers and privileges conferred by it (the act) upon the associations are very great powers and privileges, founded upon a new use and application of these government bonds especially the privilege of issuing notes to circulate as money to the amount of ninety per centum of the bonds deposited with the treasurer; (if we are not mistaken, notes may now be issued to the fall amount of the bonds) thereby, nearly doubling their amount for all the operations and business purposes of the bank. This currency furnishes means and facilities for conducting the operations of the associations which if used wisely and skillfully, cannot but result in great advantages and profits to all the members of the associations—the shareholder of the bank."

On the other hand, the only burdens annexed to the enjoyment of the great chartered rights and privileges that we find in this act of Congress, are very few.

Moreover, the property of the national banks—its property and furniture and fixtures cannot be taxed by the state, while in the case of state banks they are taxed to the bank, and is paid by the bank out of the profits so that the shareholders pay their pro rata portion of the tax out of their dividends.

Even if under the recent interpretation of our statute by the Supreme Court, government bonds owned by state banking institutions are exempt, yet it cannot be truthfully said that on that account a discrimination takes place in favor of state and savings banks, and that case does not hold that the deduction of securities in the case of state banks and not in the case of national banks, causes a discrimination.

It is a matter of common knowledge in financial circles that few national bank shareholders pay taxes on the full

amount of their holdings, but most of them manage to offset their holdings by debts. In the case of shareholders in state banks no matter how much the owner of the stock may be in debt, he pays taxes on the full amount of his stock just the same.

VII.

This is an appeal by appellant bank from the action of the City Council of Estherville, sitting as a Board of Equalization and Review, in raising the assessment on appellant's shares of stock, and on appeal from the action of the district court in sustaining the action of the city council. All the power the council had with the right to raise or lower the assessment as returned by the assessor and adjust the different assessments on the property of the city. And the only power that the district court had was to review the action of the city council and adjust it, if it thought the city council acted unfairly and erred in fixing the assessments, but the district court had no right to raise the assessment. Appellants attempt to show and have the court hold that the method of assessment provided for national bank stock, by our statute is void as in violation of section 5219 of the Revised Statutes of the U. S. The city council did not have it in its power to pass upon the constitutionality of the statute and declare it void and of no effect. If it had attempted to do such a thing it would have been usurping the powers of the judiciary. Its authority was limited to getting at the intention of the legislature as seen through the statute, and of complying with the terms of the statute, but it certainly did not have the right to pass upon the legality or constitutionality of the statute. If a such a thing were permitted on the part of such a body, it would be a very easy thing for administrative bodies to refuse to carry out the letter of the law by taking upon itself the power and au-

thority of a court and pass upon the legality of the very law it was duty bound to carry out, and in reality be its own judge of the propriety of the commands given to it for the carrying out of its public duty. The district court simply reviewed the action of the council and the council simply reviewed the action of the assessor, and inasmuch as the council could not go into the question of the constitutionality of the statute, the district court could not and that question is not properly before this court:

BYRON M. COON,
Counsel for Defendants in Error.

Additional argument pages 31- 33.

ADDITIONAL ARGUMENT.

I.

The case of *Hubbard vs. Board*, 23 Iowa, 130, referred to by counsel for plaintiffs in error on pages 15 and 27 of his brief and argument, is not applicable to this case at all, as it was decided under an entirely different Federal as well as State statute than the ones under which this case arose.

The act of Congress of June 3, 1864, governing that case, provided that the tax on shares of National banks shall not exceed the tax on *shares of State institutions*, and as the Iowa statute provided for a tax on National bank shares and for no tax on State bank shares, it, the Iowa statute, was plainly in contravention of the National Bank Act of 1864.

The banking act has been, since the decision of *Hubbard vs. Board*, changed so that the words "upon the shares" have been left out, and so that now National bank shares may be taxed in a State where the State bank shares are not taxed, but the capital is taxed instead.

Under the act of 1868 the legislatures of the various States are given the power to determine and direct the manner and place of taxing all the shares of National banks, subject to the restriction as to the rate as compared with the rate on other moneyed capital.

The Hubbard case is similar to the Van Allen case in that the State empowering statute did not meet the requirements of the National Banking Act in existence at the time.

II.

In the case of *Bank vs. Dodge*, 197 U. S., 70, relied on by opposing counsel, it is evident that section 3608 of the Political Code of California provided that "shares of stock possess no intrinsic value over and above the actual value of the property of the corporation" and the banks were taxed instead of the shares

of stock, "save and except in national banking associations whose property other than real estate is exempt by Federal statute."

Under the California law it was held that the shares of National banks must be valued at their "full cash value or market value." As the State banks were assessed on a basis of assets, there was clearly a discrimination.

IV.

Although in *Home Savings Bank vs. Des Moines*, 205 U. S., 503, this court held that the tax provided for by Iowa Statute in case of State and savings banks was against the bank and not the individual shares, yet this court ascertained that the valuation of the bank's capital or property was measured by the value of the shares (see page 510, fifth line from top of page, and page 511, near bottom of page, and top of page 513). So, on account of different manner of assessing *State and National banks in Iowa*, no inequality results under the statute.

V.

The cases cited by opposing counsel on page 17 of his brief do not support the statement made above them.

Seymore vs. Shea, 62 Ia., 711, holds that the court shall conclude from an examination of the pleadings what was raised below, rather than rely on statements of counsel.

Kaufman vs. Dostal, 73 Ia., 692–3, simply holds that in an equity case, triable de novo on appeal, where the judgment in the lower court was in excess of the prayer for relief, although a motion below to correct the judgment was proper, yet as the case is triable anew in Supreme Court, it must render the proper judgment the facts warrant.

Smith vs. Knight, 88 Ia , 280. In de novo cases Iowa Supreme Court enters the correct judgment according to record, regardless of lower court's action.

Johnson vs. Myers, 138 Iowa, 500, *Hackworth vs. Zollars*, 30 Ia., 436, *Sherwood vs. Sherwood*, 44 Ia., 192, simply hold that in de novo equity cases a party is entitled to such relief as is consistent with the allegations of the petition and evidence.

VI.

Schoonover vs. Petcina, 126 Ia., 265, quoted on page 17 of plaintiff in error's brief, holds that the objection before the treasurer need be only specific enough to raise an issue—no formal proceedings required.

We contend, though, that if before the board or on appeal written complaint is filed the issues are confined to the matters complained of—or, if in the trial court plaintiff complains orally, the issues are such matters as are complained of and entered by the judge in his minutes.

Rogers vs. Alabama, 192 U. S., 230, holds that the State court can not cast out a stated Federal question by striking from the files a pleading containing it, under some provision of State practice.

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